No. 12712

United States
Court of Appeals
for the Ninth Circuit.

L. I. MACKLIN, et al.,

Appellants.

vs.

KAISER COMPANY, INC.,

Appellee.

Transcript of Record

**Appeal from the United States District Court,
for the District of Oregon**

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS OF RECORD

MOWRY & MOWRY,

Failing Building,
Portland, Oregon.

EDWIN D. HICKS, THOMAS H. TONGUE, III,

Yeon Building,
Portland, Oregon.

For Appellants.

THELEN, MARRIN, JOHNSON & BRIDGES,
HART, SPENCER, McCULLOUCH &
ROCKWOOD, FLETCHER ROCKWOOD,

1410 Yeon Building,
Portland Oregon,

For Appellee.

In the District Court of the United States
For the District of Oregon

No. Civil 3000

L. I. MACKLIN, LEN A. MAPLE, GEORGE W. HESS, R. F. YEO, ERICK E. SUNDBERG, J. H. STONEMAN, W. G. IMUS, C. E. CULVER, A. F. WARRICK, JOHN J. HILL, J. J. KNOX, E. R. JOHNSON, M. F. WILLIAMS, H. J. WEIGEL, H. O. HANSON, ARTHUR B. TODD, JOHN T. HOLDEN, S. M. ROGERS, DANIEL J. CHASE, JOHN POPMA, GEORGE F. NICKELS, R. J. PENNIWELL, T. W. CRAIG, HERBERT J. CARLYLE, JAMES O. BRYANT, G. G. DEAN, CLINTON A. WARRINER, J. E. CRONIN, H. E. CARR, G. O. TRUE, O. L. RAWLS, W. J. PEDDICORD, O. P. BJORNSGAARD, ARTHUR E. GLENNON,

Plaintiffs,

vs.

KAISER COMPANY, INC.,

Defendant.

COMPLAINT

Come now the plaintiffs and for cause of action allege:

I.

Plaintiffs bring this action under and pursuant to the Fair Labor Standards Act of 1938 (29 U.S.C.A. 201). Jurisdiction is conferred on the Court by

Section 16 (b) of said Act and by Sections 24 (1) and (8) of the Judicial Code (28 U.S.C.A. 41).

II.

At all times mentioned herein defendant was and now is a corporation, duly organized and existing under and by virtue of the laws of the State of Nevada and engaged in interstate commerce and in the production of goods for interstate commerce within the meaning of said Act, in that defendant was and is engaged in the operation of a shipyard at Portland, Oregon, known as the Swan Island Yard at which defendant was engaged in the construction of ships, all of which have been produced from materials substantially all of which were shipped to defendant's said yard from points outside said State of Oregon and substantially all of said ships have been produced for interstate commerce and have been sold and delivered and offered for sale and delivery in interstate commerce by defendant from defendant's said shipyard at Portland, Oregon, to various points outside the State of Oregon, and, in addition, by reason of the fact that at said yard defendant was and is engaged in the repair of ships substantially all of which are regularly engaged in interstate commerce and have come to said yard for repairs from points outside said State of Oregon and are enroute after said repairs to points outside said State of Oregon, said ships being repaired by the use of materials substantially all of which were shipped to defendant's said yard from points outside the State of Oregon.

III.

At all times herein metnioned, and particularly between July 1, 1942, and March 1, 1945, said defendant maintained at said Swan Island Yard a Guard Department which said department was at all times mentioned herein, and now is, an integral, and indispensable part of said operations and of the construction of ships for interstate commerce and the repair of ships engaged in interstate commerce, as aforesaid, in that, among other things, said department protected said yard from fire, sabotage and lawlessness that might otherwise have prevented, interfered with, or impeded said production and repairs.

IV.

At all times hereinafter mentioned plaintiffs were employed by defendant in said department as guards; that all of plaintiffs had duties which included, among other things, the protection of said yard from fire, sabotage, and lawlessness, as aforesaid, and that the performance of said duties by plaintiffs was an occupation necessary to the production of said ships for interstate commerce, as aforesaid, and was also an integral and indispensable part of the repair of ships engaged in interstate commerce as aforesaid.

V.

Plaintiff L. I. Macklin is informed and believes and therefore alleges as follows, reserving the right to amend upon gaining more specific information:

A. That between September 22, 1942, and Octo-

ber 7, 1943, said plaintiff was employed by defendant as aforesaid at the regular hourly rate of 95c and was paid at said rate, with time and one half for certain of the overtime hours worked by him, including the time spent in patrolling his regular beat; that in addition to the time for which said plaintiff was paid as aforesaid, said plaintiff was employed and compelled by defendant to work thirty (30) minutes per day as a result of the fact that plaintiff was required to report for roll call, inspection, and other duties 30 minutes in advance of going on patrol of his regular beat; that all of said additional time constituted hours worked within the meaning of said Act and overtime work in excess of 40 hours per week, within the meaning of Section 7 (a) (3) of said Act for which said plaintiff has received no pay whatever and is entitled to payment at time and one half his regular rate of 95c per hour for 30 minutes each day worked, making a total of $.71¼c per day for 314 days worked during said period or a total of $223.73 which said plaintiff was not paid during said period;

B. That during the period between October 7, 1943, and January 1, 1944, said plaintiff was employed by defendant as aforesaid at the regular hourly rate of $1.03 and was paid at said rate, with time and one half for certain of the overtime hours worked by him, including the time spent in patrolling his regular beat; that in addition to the time for which plaintiff was paid as aforesaid plaintiff was employed and compelled by defendant to work 30 minutes per day as a result of the fact that said

plaintiff was required to report for roll call, inspection and other duties 30 minutes in advance of going on patrol of his regular beat; that all of said additional time constituted hours worked within the meaning of said Act and overtime work in excess of 40 hours per week, within the meaning of Section 7 (a) (3) of said Act for which said plaintiff has received no pay whatever and is entitled to payment at time and one half his regular rate of $1.03 per hour for 30 minutes each day worked, making a total of $.77½c per day for 84 days worked during said period or a total of $65.10 which said plaintiff was not paid during said period;

C. That during the period between December 17, 1944, and March 1, 1945, said plaintiff was employed by defendant as aforesaid at the regular hourly rate of $1.20 and was paid at said rate, with time and one half for certain of the overtime worked by him, including the time spent in patrolling his regular beat; that in addition to the time for which said plaintiff was paid as aforesaid plaintiff was employed and compelled by defendant to work 30 minutes per day as a result of the fact that plaintiff was required to report for roll call, inspection and other duties 30 minutes in advance of going on patrol of his regular beat; that all of said additional time constituted hours worked within the meaning of said Act and overtime work in excess of 40 hours per week, within the meaning of Section 7 (a) (3) of said Act for which said plaintiff has received no pay whatever and is entitled to payment at time and one half his regular rate of $1.20 per hour for 30 minutes each day worked, making a

total of $.90c per day for 14 days worked during said period or a total of $12.60 which said plaintiff was not paid during said period;

D. That said plaintiff has demanded that defendant pay said additional wages for said hours in accordance with the terms of Section 7 (a) (3) of said Act, but defendant, in violation of said Act, as aforesaid, has wholly failed, neglected and refused to pay any such additional wages; that by reason whereof said plaintiff is entitled to have and receive of defendant as wages and overtime compensation for the periods specified above, in accordance with said provisions of said Act, the total sum of $301.43.

E. In addition to said unpaid wages of $301.43, as hereinabove set forth, said plaintiff is entitled to receive of and from defendant, under and by virtue of the provisions of Section 16 (b) of said Act an additional amount equal to one and a half times the said plaintiff's regular rate of pay for all of said unpaid hours worked during the periods specified above; that is to say, said plaintiff is entitled to receive of and from defendant as liquidated damages under and by virtue of said provisions of said Act, an additional sum of $301.43.

F. Said plaintiff has been compelled to employ attorneys to prosecute this claim for wages and liquidated damages and said plaintiff is therefore additionally entitled to have and receive of and from defendant a reasonable amount as attorneys fees by virtue of the provisions of Section 16 (b) of said Act; that a reasonable amount to be allowed plaintiff as attorneys fees herein is the sum of $90.00.

["Paragraphs VI to XXXVII have been omitted in printing and consist of allegations similar to those of paragraph V for the following additional plaintiffs in the following amounts:

	Back Wages Claimed	Liquidated Damages Claimed	Attorneys' Fees Claimed
6. Len A. Maple	$559.54	$559.54	$170.00
7. George W. Hess	207.42	207.42	60.00
8. R. F. Yeo	613.28	613.28	180.00
9. Eric E. Sundberg	315.31	315.31	90.00
10. J. H. Stone	510.97	510.97	150.00
11. W. G. Imus	632.21	632.21	190.00
12. C. E. Culver	331.88	331.88	100.00
13. A. F. Warrick	186.98	186.98	60.00
14. Arthur E. Glennon	460.30	460.30	140.00
15. J. J. Knox	560.44	560.44	170.00
16. E. R. Johnson	397.87	397.87	120.00
17. M. F. Williams	579.38	579.38	160.00
18. H. J. Weigel	341.44	341.44	100.00
18(2) H. O. Hanson	506.41	506.41	150.00
19. Arthur B. Todd	191.93	191.93	60.00
20. John T. Holden	123.98	123.98	40.00
21. S. M. Rogers	224.63	224.63	50.00
22. Daniel J. Chase	512.92	512.92	150.00
23. John Popma	597.80	597.80	180.00
24. George F. Nickels	125.40	125.40	40.00
25. T. W. Craig	514.02	514.02	150.00
26. Herbert J. Carlyle	64.13	64.13	20.00
27. James O. Bryant	94.05	94.05	30.00
28. G. G. Dean	85.50	85.50	30.00
29. Clinton A. Warriner	128.25	128.25	40.00
30. John L. Hill	570.00	570.00	170.00
31. R. J. Penniwell	463.41	463.41	140.00
32. J. C. Cronin	300.00	300.00	90.00
33. H. E. Carr	300.00	300.00	90.00
34. G. O. True	300.00	300.00	90.00
35. O. I. Rawls	300.00	300.00	90.00
36. W. F. Peddicord	300.00	300.00	90.00
37. O. P. Bjornsgaard	300.00	300.00	90.00"]

Wherefore, plaintiffs pray for judgment in the sum of $12,000.88; for the further sum of $12,000.88 as liquidated damages; for the further sum of

$3,570.00 as attorneys fees; and for plaintiffs' costs and disbursements herein.

MOWRY & MOWRY,

/s/ EDWIN D. HICKS,

/s/ THOMAS H. TONGUE, III.

[Endorsed]: Filed Dec. 7, 1945.

[Title of District Court and Cause.]

SUPPLEMENTAL COMPLAINT

Leave having been granted to plaintiffs to file the foregoing supplemental complaint and to add as parties-plaintiff herein the following: Orval L. Lancaster, W. J. Cox, Claude F. Krigbaum, I. W. Collier, John H. Van Hook, Arthur E. Johnson, R. I. Nordeide, Lee Mainard, B. L. Cash, Perry Hunt, Charles H. Monrean, W. T. Taulbee, George E. Dopp, Theordore F. Maynard, Marion M. Long, W. C. Griffin, James W. Fader and Charles J. Wilson, now therefore, plaintiffs allege:

I.

Since the filing on December 7, 1945, of the complaint herein the foregoing Orval L. Lancaster, W. J. Cox, Claude F. Krigbaum, I. W. Collier, John H. Van Hook, Arthur E. Johnson, R. I. Nordeide, Lee Mainard, B. L. Cash, Perry Hunt, Charles H. Monrean, W. T. Taulbee, George E. Dopp, Theodore F. Maynard, Marion M. Long, W. C. Griffin, James W. Fader and Charles J. Wilson have engaged the undersigned attorneys for the original plaintiffs herein and have authorized said attorneys

to add their names as parties-plaintiff in the above-entitled cause and to seek therein to recover back wages due under the Fair Labor Standards Act of 1938 (29 U.S.C.A. 201), together with liquidated damages and attorneys fees as provided under said Act.

II.

That both the original plaintiffs herein and the parties-plaintiff added herein and whose names are listed in Paragraph I hereof are employees or former employees of defendant and are or were employed by defendant as guards at defendants Swan Island Yard at Portland, Oregon, under the circumstances as set forth in paragraphs II, III and IV of the original complaint as filed herein and all of said plaintiffs assert rights to relief in respect of and arising out of the same series of transactions and occurrences, and questions of law and fact common to all of said plaintiffs and to the respective rights and claims thereof will arise in said action.

III.

That plaintiff Orval L. Lancaster, adopts by reference all of the allegations of Paragraph V of the original complaint filed herein, which by this reference are made a part hereof, except that said plaintiff has no present recollection independent from defendant's payroll records, as to the exact periods of time, rates of pay and amounts due for each day and week worked, as well as the totals due for said periods of time, but estimates that said plaintiff was employed from April 14, 1943, to July

1944, and that there is now due and owing from defendant to plaintiff a sum in excess of $350.00, with an additional equal amount as liquidated damages and that a reasonable attorneys fee is a sum of at least $105.00 and reserves the right to amend this paragraph upon obtaining more specific information as to the matters alleged herein.

[Paragraphs IV to XX have been omitted in printing and consist of allegations similar to those of paragraph III for the following additional plaintiffs in the following amounts:

	Back Wages Claimed	Liquidated Damages Claimed	Attorneys' Fees Claimed
4. W. J. Cox	$400.00	$400.00	$120.00
5. Claude F. Krigbaum	250.00	250.00	75.00
6. I. W. Collier	100.00	100.00	30.00
7. John H. Van Hook	450.00	450.00	135.00
8. Arthur E. Johnson	350.00	350.00	105.00
9. R. I. Nordeide	650.00	650.00	195.00
10. Lee Mainard	100.00	100.00	30.00
11. B. L. Cash	650.00	650.00	195.00
12. Perry Hunt	150.00	150.00	45.00
13. Charles J. Monrean	300.00	300.00	90.00
14. W. T. Taulbee	300.00	300.00	90.00
15. George E. Dopp	300.00	300.00	90.00
16. Theodore F. Maynard	300.00	300.00	90.00
17. Marion L. Long	300.00	300.00	90.00
18. W. C. Griffin	200.00	200.00	80.00
19. James F. Fader	50.00	50.00	15.00
20. Charles J. Wilson	300.00	300.00	90.00"]

Wherefore, plaintiffs pray in addition to the sums for which judgment was prayed for in the original complaint filed herein, that judgment be entered in the sum of $5500.00; for the further sum of $5500.00 as liquidated damages; for the further of $1650.00

as attorneys fees; and for plaintiffs' costs and disbursements herein.

MOWRY & MOWRY,

/s/ EDWIN D. HICKS,

/s/ THOMAS H. TONGUE, III,

Attorneys for Plaintiffs.

Service acknowledged.

[Endorsed]: Filed Jan. 30, 1946.

[Title of District Court and Cause.]

ANSWER

Now comes defendant and for answer and defense to plaintiffs' complaint and supplemental complaint, admits, denies and alleges as follows:

I.

Defendant admits that during all the dates and times mentioned in said complaint and supplemental complaint it was and is a corporation organized and existing under and by virtue of the laws of the State of Nevada, and that defendant was during a part of the said dates and times engaged in the operation of a shipyard at Portland, Oregon, known as the Swan Island Shipyard, at which shipyard defendant, during a part of said dates and time, was engaged in the construction and repair of ships.

II.

Except as hereinabove expressly admitted, stated or qualified, defendant denies generally each and every allegation, matter and thing in plaintiffs' complaint contained and the whole thereof.

Wherefore, defendant having fully answered [3*] plaintiffs' complaint and supplemental complaint, demands judgment that plaintiffs take nothing by reason thereof, and that plaintiffs' action be dismissed.

FLETCHER ROCKWOOD,

/s/ FLETCHER ROCKWOOD,
Attorney for Defendant.

Service accepted.

[Endorsed]: Filed Feb. 18, 1946.

[Title of District Court and Cause.]

ORDER OF DISMISSAL AS TO JAMES W. FADER AND CLINTON A. WARRINER

Based upon the motion of the plaintiffs and upon stipulation of the parties hereto, by and through their attorneys of record, and good and sufficient reasons appearing therefor, it is hereby

Ordered that the above entitled cause be and the same is hereby dismissed without prejudice and without costs to either party insofar as said cause relates in any way to the claim of James W. Fader, and to the claim of Clinton A. Warriner.

*** Page numbering appearing at foot of page of original Reporter's Transcript of Record.**

Dated this 19th day of April, 1946.

/s/ JAMES ALGER FEE,
United States District Judge.

[Endorsed]: Filed April 19, 1946. [4]

[Title of District Court and Cause.]

STIPULATION RE TESTIMONY OF GEORGE MOWRY, ET AL

It is hereby stipulated by and between the parties hereto, through their respective attorneys, that Messrs. George Mowry, John Mowry, Edwin D. Hicks and Thomas H. Tongue III, if called by the plaintiffs as witnesses in this action, being duly sworn, would testify as follows:

1. That the above entitled action involves the claims of 52 employees and former employees of defendant for alleged unpaid overtime compensation under the Fair Labor Standards Act of 1938, in the amount of $17,500 and an equal amount as liquidated damages, making a total claim in the amount of $35,000.00.

2. That in connection with the said action it was necessary that plaintiffs' attorneys hold one or more conferences with nearly all of these 52 employees to ascertain the material facts concerning their claims, including the entire periods of their employment, often in excess of three years, their rates of pay, with any changes, for each week throughout such

periods, their duties during such periods and the relationship of such duties to commerce and the production of goods for commerce, the amount of time each day and each week for which they claimed wages were unpaid, and their duties during such times, in order to determine whether such time was properly "time worked" under the Act.

3. That plaintiffs' attorneys held innumerable and at times almost daily conferences, either personally or by telephone, with employees or committees of employees who called on plaintiff's attorneys through the period of over seven months required to consummate a settlement of the action and, in particular, during the period of approximately two months since the parties reached substantial agreement as to the terms of settlement, at which conferences it was necessary to explain the reasons for delay in the conclusion of the settlement because of the necessity of first securing approval by the United States Attorney, the United States Maritime Commission and the United States District Court.

4. That is was necessary to conduct legal research in order to sustain plaintiffs' position on the following legal issues involved in the action:

a. Whether plaintiffs were at all times engaged in commerce or the production of goods for commerce within the meaning of the Act.

b. Whether the time for which plaintiffs claimed payment was "time worked" within the meaning of the Act.

5. That it was necessary to prepare the evidence

to sustain plaintiffs' position on the following issues of fact involved in the action:

a. The amount of time per day and per week for which plaintiffs were not paid.

b. Whether such time was overtime work in excess of 40 hours per week.

6. That it was necessary to prepare computation of the amounts allegedly due to each of the 52 employees during the entire period of their employment, independent from company computations submitted later during the course of negotiations.

7. That it was necessary to prepare a complaint and supplemental complaint alleging the necessary facts to set forth a cause of action under the Act, including the necessary facts as to jurisdiction and coverage, and which also, due to preference of the employees themselves, set forth the claim of each of the 52 employees individually, resulting in pleadings 37 pages in length.

8. That it was necessary to make appearances in Court on six occasions for the purpose of answering call dates, presenting a motion to file a supplemental complaint, and to present the proposed settlement for Court approval.

9. That the settlement of the case necessitated a prolonged course of negotiations with the defendant and its attorneys for the purpose of arriving at a settlement of the action, beginning with conferences early in October, 1945, with the company's resident attorney at the Swan Island Yard and continuing

through over eight lengthy conferences during January, February and March with defendant's attorneys.

10. That the settlement of the case also necessitated over 20 incidental conferences, including conferences with defendants' attorneys for extensions of time to answer, conferences with associate counsel to discuss proposals for settlement made by and to defendant, and two conferences with the United States Attorney concerning his approval of the proposed settlement.

11. That plaintiffs' attorneys were successful in consumating a settlement of the action under which the plaintiffs are to receive payments in the amount of $17,352.08, which said settlement has been approved by the United States Attorney and the United States Maritime Commission.

12. That in addition to Messrs. Mowry & Mowry, plaintiffs' original attorneys, plaintiffs, through their said attorneys, also felt it advisable that they be represented by Edwin D. Hicks, Esq., because of his general experience and familiarity with federal practice, and Thomas H. Tongue III, Esq., because of his familiarity with the Fair Labor Standards Act.

13. That this case was filed before a final determination by the Oregon State Supreme Court on January 15, 1946, in the case of Fullerton v. Lamm upon the question of the constitutionality of the Oregon statute providing a six month period of

limitations in such cases, which said question had an important bearing on the recoverable amount of plaintiffs' claims against the defendant, and that, to the knowledge of plaintiffs' attorneys this case is the first action filed in this Court for unpaid overtime compensation under the Act since the submission of the Fullerton case to the Oregon Supreme Court.

14. That this is the first case in this Court involving a claim for unpaid overtime compensation under the Act against any Maritime Commission contractor which was subject to the requiring approval of settlements in such cases by the United States District Attorney Commission's general instructions to its contractors and the United States Maritime Commission in Washington, D. C.

15. That this case was taken by plaintiffs' attorneys on a contingent fee basis; that plaintiffs' attorneys have waived the right to any contingent fee or other compensation in connection with this action except such fee as may be approved by this Court, and except for a retainer fee in the amount of $250.

16. That the schedule of minimum fees adopted by the Oregon State Bar Association specifies that for damage cases taken on a contingent basis the minimum fee after suit is filed, but before trial, shall be 25% and that for other cases taken on a contingent basis the minimum fee shall be 25%.

17. That based upon the foregoing and the experience of plaintiff's attorneys as lawyers and

practitioners before the above entitled Court a fee in the amount of $3,500.00 is a reasonable fee to be allowed and approved by this Court for their services in connection with this case.

18. That subsequent to negotiation of a settlement in the above entitled case, as set forth above, together with the above agreement as to the amount of a reasonable attorneys' fee to the allowed in said case, it has been necessary for plaintiffs' attorneys to send letters to each of the 52 plaintiffs herein in order to secure approval of the amounts payable to each of said plaintiffs under said proposed settlement. It has also been necessary, by reason of the fact that defendant did not have accurate information concerning the dependency status for each of said plaintiffs for the purpose of computing deductions to be made from the amounts payable to said plaintiffs by virtue of federal income tax requirements, for plaintiffs' attorneys to again write to each of said 52 plaintiffs in order to secure the necessary information concerning the dependency status of said plaintiffs. In addition, it may also be necessary for plaintiffs' attorneys to secure from each of said plaintiffs a signed satisfaction of judgment before the amounts payable to each of said plaintiffs will be actually disbursed by defendant.

19. That also subsequent to said agreement for settlement and attorneys' fees it has been necessary for plaintiffs' attorneys to prepare and file motion and stipulation and judgment for dismissal without prejudice of said case insofar as the same relates

to the claim of James W. Fader in the amount of $31.86, and the claim of Clinton A. Warriner in the amount of $108.63.

Dated this 19th day of April, 1946.

MOWRY & MOWRY,
/s/ EDWIN D. HICKS,
/s/ THOMAS H. TONGUE, III,
Attorneys for Plaintiffs.

/s/ FLETCHER ROCKWOOD,
HART, SPENCER,
McCULLOCH & ROCKWOOD,
Attorneys for Defendant.

[Endorsed]: Filed April 19, 1946.

[Title of District Court and Cause.]

STIPULATION WAIVING FINDINGS OF FACT AND CONCLUSIONS OF LAW, NOTICE OF ENTRY OF JUDGMENT, RIGHT TO MOTION FOR NEW TRIAL, AND RIGHT OF APPEAL

It is hereby stipulated by and between plaintiffs, acting through their attorneys herein, Messrs. Mowry and Mowry, Edwin D. Hicks, and Thomas H. Tongue, III, and defendant, Kaiser Company, Inc., acting by and through its attorneys herein, Messrs. Fletcher Rockwood and Hart, Spencer, McCulloch and Rockwood, as follows:

1. That all of the parties to the above mentioned action do hereby waive findings of fact and conclusions of law in said action, notice of entry of judgment, the right to move for a new trial, and the right to appeal from the judgment entered by the above entitled Court in said action; and

2. That the judgment entered herein by the above entitled Court shall become final forthwith.

Dated at Portland, Oregon, this 19th day of April, 1946.

MOWRY & MOWRY,
/s/ EDWIN D. HICKS,
/s/ THOMAS H. TONGUE, III,
Attorneys for Plaintiffs.

/s/ FLETCHER ROCKWOOD,
HART, SPENCER,
McCULLOCH & ROCKWOOD,
Attorneys for Defendant.

[Endorsed]: Filed April 19, 1946.

[Title of District Court and Cause.]

STIPULATION FOR JUDGMENT

It Is Hereby Stipulated by and between plaintiffs named in the complaint and supplemental complaint herein, acting by and through their attorneys herein, Messrs. Mowry and Mowry, Edwin D. Hicks, and Thomas H. Tongue, III, and defendant, Kaiser Company, Inc., acting by and through its attorneys, Messrs. Fletcher Rockwood and Hart, Spencer, McCulloch and Rockwood, as follows:

Whereas:

1. Plaintiffs have instituted this action for the recovery of amounts claimed to be due to them as overtime compensation under the provisions of Section 7(a) of the Fair Labor Standards Act of 1938, referred to in the complaint and supplemental complaint herein and hereinafter as the "Act," and for the recovery of liquidated damages, attorneys' fees, and costs as provided in Section 16(b) of the Act;

2. Defendant has by its answer denied that it is indebted to plaintiffs, or to any of them, for overtime, liquidated damages, attorneys' fees, and costs, or any of such items;

3. This action has been dismissed without prejudice insofar as it relates in any way to the claim of James W. Fader and the claim of Clinton A. Warriner;

4. Questions of fact and of law have arisen with respect to the claims of plaintiffs against defendant

referred to in the complaint and the supplemental complaint herein regarding: (1) the number of hours, if any, in excess of forty (40) hours per week worked by plaintiffs, and each of them, for defendant; (2) the amount of time, if any, which plaintiffs, and each of them, were compelled to spend in reporting for roll call, inspection, and other duties before or after the time spent in the performance of their regular duties as described in Paragraph IV of the complaint; (3) whether such time was time worked within the meaning of the Act; and (4) whether the nature of the work performed by plaintiffs was such as to entitle them to the benefits of the Act;

5. A bona fide controversy and dispute, both as to facts and law, exists between plaintiffs and defendant regarding the right of plaintiffs to collect and receive, and the obligation of defendant to pay, the overtime compensation, liquidated damages, attorneys' fees, and costs claimed due to plaintiffs from defendant by reason of the matters referred to in the complaint and the supplemental complaint herein;

6. Plaintiffs and defendant desire to settle and adjust said controversy and dispute in the manner herein provided, and to agree and stipulate on the payments to be made to plaintiffs, and to their attorneys, by defendant in full settlement and discharge of all of the claims and demands of plaintiffs as set forth in the complaint herein; and

7. Plaintiffs and their undersigned attorneys

represent to defendant that each of said plaintiffs has authorized the settlement and adjustment of his claim against defendant set forth in the complaint and the supplemental complaint herein on the basis hereinafter stated:

Now, Therefore, It Is Hereby Stipulated and Agreed that judgment may be made and entered by the above entitled Court in favor of plaintiffs and against defendant, as follows:

1. For the payment by defendant to each of the plaintiffs of the sum set forth after his name on the schedule attached hereto, marked Exhibit A and by this reference made a part hereof; provided, however, that defendant may withhold from each sum deductions for federal income and social security taxes. The payment by defendant of the respective sums (less the mentioned deductions) to plaintiffs, respectively, shall, except for the matters hereinafter provided, be in full and complete satisfaction and discharge of all and every liability and obligation of defendant accrued prior to the date hereof to plaintiffs, and to each of them, pursuant to the Act, and particularly for overtime compensation and liquidated damages asserted to be due and payable by defendant to plaintiffs, and each of them, under and pursuant to the provisions of the Act.

2. For the payment by defendant to the attorneys for plaintiffs, Messrs. Mowry and Mowry, Edwin D. Hicks, and Thomas H. Tongue, III, of a reasonable

attorneys' fee for their services herein, in the sum of three thousand five hundred dollars ($3,500.00).

3. For the payment by the defendant to plaintiffs of the costs of suit herein in the sum of seventeen and 48/100 dollars ($17.48).

Dated at Portland, Oregon, this 19th day of April, 1946.

MOWRY & MOWRY,
/s/ EDWIN D. HICKS,
/s/ THOMAS H. TONGUE, III,
Attorneys for Plaintiffs.

/s/ FLETCHER ROCKWOOD,
HART, SPENCER,
McCULLOCH & ROCKWOOD,
Attorneys for Defendant.

EXHIBIT A

Badge	Name	Total
3579	Macklin, L. I.	$ 348.56
3941	Maple, Len A.	560.10
91267	Hess, George W.	223.73
3542	Yeo, R. F.	598.95
6928	Sundberg, Erick E.	300.63
6704	Stoneman, J. H.	527.94
3906	Imus, W. G.	626.67
48264	Culver, C. E.	428.42
86503	Warrick, A. F.	196.02
3343	Hill, John J.	630.70
21280	Knox, J. J.	559.54
17574	Johnson, E. R.	455.60

Exhibit A—(Continued)

3818	Williams, M. F.	595.78
48557	Weigel, H. J.	350.47
18046	Hanson, H. O.	527.20
86234	Todd, Arthur B.	215.68
86330	Holden, John T.	118.86
3336	Rogers, S. M.	188.30
6473	Chase, Daniel J.	523.06
3694	Popma, John	641.97
86767	Nickels, George F.	130.64
47677	Penniwell, R. J.	464.03
3947	Craig, T. W.	487.85
87231	Carlyle, Herbert J.	60.65
87065	Bryant, James O.	99.28
48662	Dean, G. G.	60.81
3916	Cronin, J. E.	531.02
1505	Carr, H. E.	550.05
87090	True, G. O.	89.18
85273	Rawls, O. L.	334.41
48063	Peddicord, W. J.	404.99
3640	Bjornsgaard, O. P.	601.79
6867	Glennon, Arthur E.	426.81
63869	Lancaster, Orval L.	244.33
85703	Cox, W. J.	279.75
86730	Krigbaum, Claude F.	74.97
87222	Collier, L. W.	67.80
30546	Van Hook, John H.	426.66
85502	Johnson, Arthur E.	305.54
6925	Nordeide, R. I.	429.14
87074	Mainard, Lee	81.42
6877	Cash, B. L.	437.32
3829	Hunt, Perry	103.17

Exhibit A—(Continued)

6822	Monrean, Charles H.	510.79
90447	Taulbee, W. T.	244.09
48453	Dopp, George E.	388.12
86865	Maynard, Theodore F.	74.74
48175	Long, Marion M.	241.22
85916	Griffin, W. C.	142.24
36056	Wilson, Charles J.	476.84
	Total	$17,387.83

[Endorsed]: Filed April 19, 1946.

In the District Court of the United States
For the District of Oregon

Civil No. 3000

L. I. MACKLIN et al.,

Plaintiffs,

vs.

KAISER COMPANY, INC.,

Defendant.

PROPOSED FORM OF JUDGMENT

The above-entitled cause came on for hearing before the above-entitled Court, Hon. James Alger Fee, United States District Judge, presiding, upon the issues presented by the complaint and supplemental complaint of plaintiffs and the answer of defendant, Kaiser Company, Inc., the plaintiffs appearing and being represented by their attorneys,

Messrs. Mowry and Mowry, Edwin D. Hicks, and Thomas H. Tongue, III, and defendant, Kaiser Company, Inc., appearing and being represented by its attorneys, Messrs. Fletcher Rockwood and Hart, Spencer, McCulloch and Rockwood; and

The Court having heard and considered said cause and having received the stipulation of the parties, acting by and through their aforesaid attorneys, that a judgment in said cause might be made and entered as hereinafter provided, and the cause having been submitted to the Court for decision, the parties having waived findings of fact and conclusions of law, and the Court being fully advised in the premises,

It Is Therefore Ordered, Adjudged, and Decreed as follows:

1. That in full and complete satisfaction and discharge of each and every claim set forth in the complaint and the supplemental complaint existing prior to the date hereof in favor of plaintiffs, and each of them, and against defendant, and particularly of all claims and demands accrued prior to to the date hereof of plaintiffs against defendant for overtime compensation and liquidated damages arising under or pursuant to the provisions of the Fair Labor Standards Act, that defendant, Kaiser Company, Inc., pay to each of plaintiffs the sum set forth after his name on the attached schedule (marked Exhibit A and by this reference made a part hereof), less deductions for federal income and social security taxes.

2. That defendant pay to plaintiffs' attorneys, Messrs. Mowry and Mowry, Edwin D. Hicks, and Thomas H. Tongue, III, the sum of...., which amount is hereby determined to be the reasonable value of the services rendered by said attorneys on behalf of plaintiffs in this cause.

3. That defendant pay to plaintiffs their costs of suit herein, in the sum of seventeen and 48/100 dollars ($17.48).

Done in open Court this....day of April, 1946.

....,
United States District Judge.

EXHIBIT A

[Identical to Exhibit A attached to the Stipulation for Judgment. See pages 25 to 27 of this printed record.]

In the District Court of the United States
For the District of Oregon

Civil No. 3000

L. I. MACKLIN, et al,

Plaintiffs,

vs.

KAISER COMPANY, INC.,

Defendant.

Friday, April 19, 1946, A.M.

Before: Honorable James Alger Fee,
Judge. [1*]

Appearances:

MOWRY & MOWRY AND THOMAS H. TONGUE III,

Of Attorneys for Plaintiffs;

THELEN, MARIN, JOHNSON & BRIDGES,
By MR. JOHNSON, AND

HART, SPENCER, McCULLOCH & ROCKWOOD, by
MR. FLETCHER ROCKWOOD,

Appearing for Defendant;

HENRY L. HESS,
United States Attorney.

* Page numbering appearing at top of page of original Reporter's Transcript of Record.

PROCEEDINGS

The Court: Civil 3000, Macklin versus Kaiser Company.

Mr. Tongue: May it please the Court, before proceeding to present the terms of settlement in this case for approval of the Court, I would like to submit a motion that the cause be dismissed without prejudice and without costs to either party in so far as the case relates to the claims of James W. Fader and Clinton A. Warriner. This motion is based on stipulation signed by the attorneys for the parties, your Honor. At this time I would like to present a proposed order to that effect.

The Court: Any objection? The order is granted.

Mr. Tongue: As the Court, I think, is well aware, this is a suit against Kaiser Company at its Swan Island Yard, brought under the Fair Labor Standards Act of 1938, by fifty-two of its employees and former employees—now fifty, following the order of dismissal for the two parties mentioned. [2]

These plaintiffs were employed by Kaiser Company as guards at its Swan Island Yard and claim that they had not been paid for one-half hour each day that they worked as a result of being required to report for duty, at least for the purposes of roll call and inspection, half hour before they actually went on their shifts. As a result of this claim by these fifty employees and former employees, the total wages claimed equal the sum of $17,500.88, as alleged in the original complaint and supplemental complaint. There is also a claim for liquidated

damages in the same amount, that is, $17,500.88. In addition, these plaintiffs request that the Court allow them as a reasonable attorneys' fee the sum of $5,220.

The Company then filed a general answer—a general denial, I should say, which raised, among other things, the followings issues:

First, the number of hours, if any, over forty hours in any week that these men worked. The Company took the position that many of these men had been relieved early, and, even though they did report half an hour early, since they were released early there would be no overtime resulting. The Company also claimed that others of these plaintiffs had a lunch hour with pay, and that since that lunch hour equalled at least one-half hour there was no overtime, even if they were to be paid for this half an hour between roll call and going on shift.

Of course, the plaintiffs and their attorneys deny [3] these positions taken by the company and its attorneys.

The second principal issue that arose was the actual amount of time that was spent by these plaintiffs between reporting for inspection and roll call and going on their jobs. The Company took the position that many of them did not get there half an hour early, and certainly not at all times. They took the position that at least for a large part of the time these men did not get there half an hour early and did not get there any substantial amount of time before they actually went on shift.

Of course, the plaintiffs and their attorneys again denied this claim and an issue of fact resulted.

There is also the issue of law whether this standby time, as it might be called, between reporting for inspection and roll call and going on actual shift, was time worked within the meaning of the Fair Labor Standards Act, and then there is the question of whether all of these men, at least, were engaged in commerce, or in the production of goods for commerce, while they were engaged in this work. One way in which that question arose was that some of these plaintiffs, at least, were engaged in performing guard duties at the dormitories operated by the Yard, and there was a question of whether that constituted work related to commerce or necessary to the production of goods for commerce.

So that the Court can therefore see that this general [4] denial did raise substantial issues of both fact and law, including these issues that have been mentioned. As a result, and after a prolonged, very prolonged, series of negotiations, the attorneys for the plaintiffs reached an agreement that a fair settlement of these issues, including both the claims for back wages themselves and the claim for liquidated damages, would be to allow each man one-half hour at his regular rate of pay for each day that he worked, at the straight time or overtime rate, depending on the circumstances, and, as I say, this would represent a compromise not only of the claim for the overtime for the back wages themselves, but also a compromise of the claim for liquidated dam-

ages. As this is computed, the total amount to be paid under this settlement, leaving out the two plaintiffs with respect to whom the case has been dismissed, would total $17,387.83.

Now, under the regulations, as I understand them, prescribed by the United States Maritime Commission, it is first necessary for the United State Attorney and the office of the U. S. Attorney General to give their approval, at least to the extent that a given case is a proper case to be subject to settlement. I understand that that approval has been given by Mr. Hess and by the office of the Attorney General. The U. S. Maritime Commission also reserves to itself the right to approve not only the basis of the settlement but the amount to be paid to each employee and, subject to the Court's approval, [5] of course, the amount to be paid as a reasonable fee to the attorneys for the plaintiffs, and this approval has also been given, and, if the Court thinks it advisable, I believe that Mr. Rockwood is prepared to present a photostat copy of that approval.

So we therefore submit, leaving aside for the moment the matter of attorneys' fees, a stipulation for the entry of judgment, a stipulation waiving findings of fact and conclusions of law, notice of entry of judgment and right of a motion for a new trial and right of appeal, and a proposed judgment based upon these stipulations.

I believe, your Honor, that completes the statement, except for the matter of attorneys' fees, unless counsel has some further comments to make or

unless the Court has some questions. Does the Court have any further questions?

The Court: No, I think not.

Mr. Tongue: Do you have anything to say, Mr. Rockwood?

Mr. Rockwood: No, if your Honor please, I think the situation presented by Mr. Tongue is satisfactory to the defendants. We are prepared to have the judgment entered, with the Court's approval.

Mr. Tongue: Does the Court desire to have a copy of the Martime Commission's approval?

The Court: I think in a public thing of this sort that it is my idea at this time that there be some proof submitted [6] to support the judgment. I am not going to simply rubber stamp somebody's findings in these things.

Mr. Tongue: You mean both as to the merits of the case and as to the matter of attorneys' fees? Is that correct?

The Court: I think it might be well for somebody to testify to the facts as the basis for settlement. If it is to be put under supervision as closely, where the Court acts on it, I think we had better have some testimony.

Mr. Tongue: Mr. Mowry advises me that none of his clients are here, so that there wouldn't be the benefit of testimony by any of the guards themselves, unless the Court desires to postpone the matter for that purpose. Of course, both the Mr. Mowrys have interviewed all of these people and can testify to that extent, as to the facts of their

claims, if that would meet the approval of the Court. Mr. Rockwood also tells me that Mr. Tuson, one of Kaiser Company's attorneys at the Swan Island Yard, is here in court and is prepared to testify as to the practice there and the way in which this arose, if that is felt necessary by the Court.

The Court: I don't want to make it burdensome, but this is the first time that this has come up. I think that there should be testimony in each of these cases to support the judgment.

Mr. Rockwood: Well, if your Honor please, I can call Mr. Tuson. He is a member of the Bar of the State of Idaho, but [7] not of the Bar of this Court or of Oregon. He has been engaged in the administrative work there at the Yard and it was under his supervision that these calculations were made upon which the settlement was arrived at, in so far as the Company is concerned.

The Court: I think that would be satisfactory.

Mr. Rockwood: I will call Mr. Tuson. [8]

WILLIAM TUSON

was thereupon produced as a witness in behalf of the defendant herein and was examined and testified as follows:

The Clerk: State your name.

A. William Tuson.

The Clerk: Will you spell it.

A. (Spelling) T-u-s-o-n.

(The witness was then duly sworn.)

(Testimony of William Tuson.)

Direct Examination

By Mr. Rockwood:

Q. By whom are you employed, Mr. Tuson?

A. By the Kaiser Company, Kaiser Company, Inc.

Q. At what location?

A. At the present time my office is at Swan Island Shipyard.

Q. In the City of Portland?

A. That is right.

Q. How long have you been employed by Kaiser Company, Inc., at the Swan Island Yard?

A. I have been employed by Kaiser Company since September of 1942. However, my office has been at Swan Island since about June, 1943.

Q. Prior to that time where were your headquarters?

A. My headquarters were at the Vancouver Shipyard.

Q. Of the same company?

A. That is right. [9]

Q. In what department were you working there at the Swan Island Yard?

A. In the Director of Industrial Relations. I was an assistant to the Director of Industrial Relations.

Q. And what was his name?

A. Mr. J. O. Murray.

Q. Did that department have supervision over the matter of wages, hours, working conditions and

(Testimony of William Tuson.)

contracts with labor unions and relations generally with employees of the yard? A. Yes.

Q. And were you familiar in your work with such matters, as they affected the defendant, at that yard?

A. I didn't understand your question.

Q. Were you familiar with the matters handled by that department at the Yard during the period that you were engaged at the Yard? A. Yes.

Q. Were you advised at the time of the filing of the complaint of this case, Macklin against Kaiser Company, Inc.? A. Yes.

Q. Tell us what you have done by way of checking of the claims of the various individuals who are included in this complaint to determine whether or not the men had worked, to determine the extent of time that they had worked on particular days and in particular weeks, and to determine the character of the work which was performed by them. Tell us, very generally, what you [10] did.

A. I first received a copy of the complaint, which I read, and then I contacted Captain Utley, who was the immediate supervisor of the plaintiffs and other guard employees in the Swan Island Yard. I went into detail with him as to the requirements of these men in reporting early, what instructions had been given the men, what the actual practice was in regard to the men reporting early, also what the practice was in regard to lunch periods, and whether or not—or, rather, what type of work was being performed in the yard during the period of time

(Testimony of William Tuson.)

covered by the complaint. I then checked with the payroll department and had them make a listing, which was done mechanically by IBM machines,——

Q. "IBM"—International Business Machines?

A. Yes, sir,—running a payroll day by day of each one of these plaintiffs, setting up the amount of time that each plaintiff had worked each day as guard while in our employ. We then computed the number of hours that each guard had worked each week.

Q. Have you read the stipulation which was presented to the Court this morning for a judgment, which has attached to it as Exhibit A a tabulation with the list of some fifty individuals, with amounts set opposite their names, and totalling $17,387.83? A. I have.

Q. What did you have to do with preparing the data which [11] resulted in that Exhibit A?

A. I got that data from the listing that the payroll department had made. I might add that after the number of hours that each employee had worked per week was compiled we then added to each day that the employee had worked an amount of time of one-half hour. We multiplied that one-half hour by the employee's regular rate of pay where the time that he had worked during the week plus the one-half hour per day was less than forty hours work per week, and to the extent that that amount was over forty hours per week we multiplied the half hour allowance per hour by time and a half his regular rate of pay, and did that for each week,

(Testimony of William Tuson.)

and in that way compiled or computed the amounts that are set opposite each name on the exhibit.

Q. Is this Exhibit A a correct tabulation of the data computed in the manner that you have just described? A. It is.

Q. From the records at Swan Island Yard were you able to determine the fact as to the particular individual whether or not on a particular day he did work thirty minutes in addition to the time shown on the payroll?

A. We didn't have adequate records to show that. All that I could find out was what our general practice was. At the start of the construction of the shipyard a pamphlet was issued of instructions to guard employees. In that pamphlet guard employees were told that they would be required to report to the [12] guard station one-half hour before the regular shift changed time, in order to stand inspection, answer the roll call, and receive assignment of duties. However, from an actual practice that particular rule was never enforced. The roll call time gradually got later and later, and if a man was late he wasn't penalized, or anything of that nature, for coming in late.

Q. Well, from your investigation did you determine the fact to be that in some instances, the extent of which is indeterminate, men would report as little as five minutes before a shift time?

A. I was told that, but we had no records to prove that.

Q. And from your investigation, then, you de-

(Testimony of William Tuson.)

termined the actual time that they reported in advance of shift time was variable, from a very few minutes up to maybe a maximum of thirty minutes?

A. That is right.

Q. So that the fact is that the method of computation which you used perhaps overstates greatly the actual time in excess of forty hours a week that the men worked—or the actual time in excess of the time shown on the payroll that the men actually worked? A. That is right.

Q. Did you participate in the conference with plaintiffs' attorneys which led up to this stipulation which is now presented to the Court?

A. I have. [13]

Q. Is it a fact that the amount arrived at in Exhibit A is a compromise between the parties which they arrived at in recognition of the impossibility of proof of the actual facts?

A. That is correct.

Mr. Rockwood: I have nothing further, your Honor.

Mr. Tongue: I would like to ask a question, if I may, your Honor.

Cross-Examination

By Mr. Tongue:

Q. Mr. Tuson, you have testified that so far as the Company could determine these men reported for work in advance of going on shift anywhere from a few minutes in advance of shift time to as much as half an hour, is that correct?

(Testimony of William Tuson.)

A. Yes.

Q. I would like to ask this question, Mr. Tuson: What would be the sum payable to these men if they were given credit for fifteen minutes each day that they worked but were also paid not only the amount of their claimed back wages but an equal amount for liquidated damages? Would that amount be greater or less, or the same, than the amount as prepared by your computations?

A. It would be slightly less, for the reason that in these computations these men were allowed one-half hour at straight time where their total hours for the week were less than forty. Now, my understanding, we would not be required to pay [14] liquidated damages on that amount.

Q. Your computation, though, assumes that it is a compromise of both back wages and liquidated damages, is that right?

A. That is right, yes.

Q. And no additional equal amount is added as liquidated damages in your computation?

A. Not as such. We arrived at a formula in estimating an amount for settlement of all claims lodged by the plaintiffs.

Q. Both for overtime and for liquidated damages? A. All claims. Yes.

Mr. George Mowry: If your Honor please, if your Honor should not be satisfied with the testimony of Mr. Tuson as the basis for compromise and judgment, we would like to have an opportu-

(Testimony of William Tuson.)

nity to call some of the guards. We have talked to them and——

The Court: The Court is of opinion that this is not the ordinary type of a lawsuit, but that it has public basis, which should be supported by a public hearing. At that public hearing the Court is of the opinion both sides should present certain testimony as to the fairness of the settlement, and likewise the Court is of the opinion that some representatives of plaintiffs besides their attorneys should be present in Court, because the policy of the Court that it has been following in pre-trial conferences in having the parties to civil controversies in court is of a very salutary nature. This is really taking the place [15] of a pre-trial conference, and if it is a judicial matter at all I think the parties should be present, at least by their representatives, and I mean by that not the lawyers but by representatives from each side.

Mr. George Mowry: We will be glad to do that.

The Court: Can you have them here at 2:00 o'clock?

Mr. George Mowry: That I think would be almost impossible, your Honor, because, of course, we had expected—of course, I am frank to say, I am no authority on Federal procedure, and my brother isn't either—we had expected that this matter would be disposed of without taking of testimony. For that reason we have no guards here on call. We could get them here easily by the middle of next week, a very considerable number of them.

(Testimony of William Tuson.)

The Court: Well, inasmuch as this is the first case of this type, unless there is objection by the other parties—I might say that I thought I had given sufficient warning to everybody that this is a type of proceeding that the Court would feel was necessary to support this type of a settlement, and unless there is serious objection I am inclined to favor the idea that this should go over.

Mr. Tongue: Your Honor, I don't object at all, but I do have here a document, which I think might satisfy the Court, concerning the instructions given by the Company to the men to sustain their position that one-half an hour—— [16]

The Court: That isn't my point. My point is that I think that there should be some representatives of the plaintiffs themselves in Court. That is my point.

Mr. George Mowry: If your Honor please, these gentlemen whispered to me and asked if we had the written approval of these plaintiffs to this settlement. We have the written approval of fifty-one of the fifty-two, and of course that includes this entire fifty, that they all approved this settlement in writing. We have those documents and could bring them up here and would be glad to do that.

The Court: I am of the opinion that if this is a judicial proceeding at all—and apparently it is—the representatives of the plaintiffs should be present in court, and I mean by that not their lawyers. Now, I am trying to be very emphatic about that.

(Testimony of William Tuson.)

In other words, if I am going to enter a judgment on the settlement, bring them in here.

Mr. George Mowry: We will bring them in. We can bring in most of them.

The Court: When would you like to have it go over to?

Mr. George Mowry: I would like to have it go over to Wednesday or Thursday. I think by that time we could get most of them in here.

Mr. Rockwood: I have no objection, of course, to it going over as the Court suggests. I do say this, that my own program, personally, from Wednesday on next week and for the next [17] about ten days makes it almost impossible for me to participate in any such hearing. There are Interstate Commerce matters taking up at the end of the week. Then I am going out of town at the end of next week and into the following week. Can we have it Tuesday?

Mr. George Mowry: Yes, I will say that, to accommodate Mr. Rockwood, I can get most of them here Tuesday.

The Court: I am not insisting that they all be here. I am saying we should have certain representatives. We are dealing with delicate matters here, and I think that these matters should not be presumed upon. And at that time, likewise, I shall expect you to introduce testimony as to the reasonableness of the attorneys' fees.

Mr. Tongue: I might say, your Honor, that we have in Court two gentlemen to support our request

(Testimony of William Tuson.)

in that connection. If it would be suitable to the Court, I believe it might accommodate them if we can proceed to present that portion of the case this morning, leaving for next Tuesday the remaining portion of the case relating to the settlement of the case on its merits.

The Court: Well——

Mr. Rockwood: Mr. Tuson is excused, is he?

The Court: Yes.

(Witness excused.)

The Court: I might say that it makes it a little easier and I would rather have the plaintiffs whole proceeding, but [18] in view of the fact that this is the first case of this type and that everybody will be on notice in the future as to what the Court is going to expect, if you have your experts on attorney fees I will hear them.

Mr. Tongue: It is entirely agreeable, your Honor, to let the entire matter go over until Tuesday of next week. Counsel has requested that, if it is agreeable to the Court, we be allowed to proceed on the matter of attorneys' fees.

The Court: Yes.

Mr. Tongue: In that connection, your Honor, we are prepared to proceed in either of two ways, depending upon the desires of the Court. All of the attorneys for the plaintiffs, with the exception of Mr. Edwin Hicks, are present in court and available to testify. We also have present two disinterested attorneys, Mr. Gunther Krause and Mr. Sid-

ney Graham. If, however, the Court is interested in expediting the proceeding, we have prepared a stipulation as to what plaintiffs' attorneys would testify to if called and could support that by testimony of Mr. Krause and Mr. Graham, and supplemented by testimony on the part of plaintiffs' attorneys on any points that the Court may desire to have further developed.

The Court: Yes. You may proceed.

Mr. Tongue: Do you wish to receive this stipulation, your Honor?

The Court: Yes. [19]

Mr. Tongue: To save the time of the Court, I will hand it to the Court to read for himself.

The Court: Call your witness.

Mr. Tongue: Mr. Gunther Krause. [20]

GUNTHER F. KRAUSE

was thereupon produced as a witness in behalf of the plaintiffs herein and, having been first duly sworn, was examined and testified as follows:

Mr. Tongue: May it please the Court, I think it might expedite the proceeding if your Honor might read the stipulation before examining Mr. Krause, as his testimony is based largely upon those facts.

The Court: Go right ahead.

Mr. Tongue: Very well.

Direct Examination

By Mr. Tongue:

Q. Will you please state when you were first admitted to the Bar of the State of Oregon?

(Testimony of Gunther F. Krause.)

A. 1922.

Q. Have you taken part in cases involving labor controversies? A. Yes, I have.

Q. In what capacity, Mr. Krause?

A. Well, in cases under the Fair Labor Standards Act I represented both the claimants and the employers.

Q. During what period of time have you engaged in such controversies?

A. Oh, since the passage of the Act, when claims first were made; from 1938 on, I guess.

Q. Have you ever had occasion to advise employers concerning the amounts of fees to be allowed attorneys for employees in [21] suits under the Fair Labor Standards Act as reasonable attorneys' fees?

A. Yes, I have had to tell them what I considered a reasonable fee to be, and they paid as attorneys' fees, generally, what I recommended.

Q. Have you also been in the position of advising employees in the same respect?

A. Yes, I have.

Q. Are you familiar with the practice of other attorneys and of employers and claimants in similar cases?

A. Yes, I have discussed this matter with attorneys representing employers and claimants in quite a number of cases.

Q. Mr. Krause, have you read the stipulation which has been presented to the Court as to what the plaintiffs' attorneys would testify if called and

(Testimony of Gunther F. Krause.)

sworn as to the nature and extent of their services in this case?

A. Yes, I have read the stipulation.

Q. Assuming a hypothetical case involving facts identical with those set forth in this stipulation, would you be prepared to express an opinion as to the reasonable value of attorneys' fees in such a case? A. Yes.

Q. What is your opinion, under such circumstances?

A. Well, a reasonable fee in this case would be from thirty-five to forty-five hundred dollars, in my opinion. [22]

Q. Would you please state the basis upon which you express that opinion?

A. Well, I have taken into account the time consumed, spent, by the attorneys in a matter of this sort. It by no means is limited to the time that the attorneys for the claimants were actually engaged on this case. Anyone that is going to handle any cases under the Fair Labor Standards Act has a good deal of work to do besides ascertaining the facts of the case and looking up the law, and particularly on the questions raised by this case. Based on the law and the amount of time and the difficulties in cases of this character, the ability of the attorneys representing the employer, taking all those factors into consideration, it is my opinion that an attorneys' fee of about twenty-five per cent. of the amount recovered would be reasonable. $3500 is below a twenty-five per cent. figure, and I think

(Testimony of Gunther F. Krause.)
that $3500 is on the low edge of what is reasonable in a case of this kind.

Q. Mr. Krause, does that figure conform with allowances which you yourself have recommended to employers?

A. Well, I have not often been able to get away with an attorney's fee of twenty-five per cent. I have had to pay, while representing employers, a very much larger percentage than that in a good many cases, although the total amount involved was much smaller than this one, and that, of course, justifies a difference in the percentage rate. [23]

Q. Do you feel that the figure which you have expressed as your opinion of a reasonable attorneys' fee coincides with your own experience and with the cases which you have observed of a similar nature?

A. Yes, it is well within the range of what I have paid and received, having in mind the differences in the amounts involved, the total amounts and the number of claims involved.

Mr. Tongue: That is all, your Honor.

Mr. Rockwood: I have no questions.

Mr. George Mowry: If your Honor pleases—oh, is the witness excused?

The Court: Yes.

(Witness excused.)

Mr. George Mowry: If your Honor pleases, Mr. Rockwood has stated that he was leaving for San Francisco very soon—I think Mr. Krause said he was also——

Mr. Krause: Yes, Sunday.

Mr. George Mowry: ——and, therefore, he could not be here next week to testify. I have consulted Mr. Graham and he says he can be here, and it would suit me a little bit better to see how much further this case is going to go in the way of evidence before these attorneys' fees are going to be passed on, and as far as Mr. Graham is concerned it would suit us a little better if he returned Tuesday.

The Court: The Court has already expressed the idea that [24] the balance go over until Tuesday. It makes no difference. I will hear you now or on Tuesday, just as you wish.

Mr. Tongue: May it please the Court, may we then request that the entire remaining matters go over until next Tuesday at 10:00 o'clock, if that is satisfactory?

The Court: Very well, Tuesday at 10:00 o'clock.

(Whereupon, at 11:15 o'clock a.m., Friday, April 19, 1946, proceedings in the above-entitled matter were continued to Tuesday, the 23d day of April, A.D. 1946, at the hour of 10:00 o'clock a.m.) [25]

Tuesday, April 23, 1946, 10:30 A.M.

(Proceedings in the above-entitled cause were resumed and continued as follows:)

The Court: Macklin, et al., plaintiffs, versus Kaiser Company, Inc., defendant:

As I understand the procedure this morning, the plaintiffs will call certain representatives of members of the plaintiffs' group to testify regarding——

Mr. George Mowry: Yes, your Honor. We are going to call, first, Mr. Culver. Before we call him, I would like to make this statement to the Court, that this complaint, as your Honor will undoubtedly recall from the pleadings, is based upon the idea that all of these men have worked thirty minutes, or were on duty thirty minutes, or were on the premises thirty minutes, for which they received no pay. Now, after Friday we contacted all the guards we could by telephone, and among them Mr. Maple, who is the second man in the complaint. The complaint alleges that he went to work in 1942 and that during all the time he was there he worked or was on duty this extra thirty minutes. Yesterday, for the first time that I had ever heard of or that my brother had ever heard of, he announced to us that he thought that for the first six months, maybe the first year, they were only on duty twenty minutes of this extra time. I haven't heard that from anybody else, but in view of the fact that he makes that statement it may be possible that we would want to amend [26] the complaint as to him. He has made that statement and I have so advised the attorneys for the defendant.

Shall I call a witness, your Honor?

The Court: Yes, if you will.

Mr. George Mowry: We will call Mr. Culver. Will you take the stand right over there, Mr. Culver. [27]

CLARENCE E. CULVER

one of plaintiffs herein, was thereupon produced as a witness in behalf of plaintiffs and was examined and testified as follows:

The Clerk: Will you state your full name, please.

A. Clarence E. Culver.

The Clerk: Clarence E.? A. Yes.

The Clerk: How do you spell your last name?

A. (Spelling) C-u-l-v-e-r.

(The witness was then duly sworn.)

The Clerk: Clarence E. Culver.

The Court: Just a moment. I note that there is no representative of the United States Attorney's office present. I understand he is an important member of this group. Will you have Mr. Hess called. Court will be in recess until Mr. Hess comes in.

(A short recess was thereupon had, following which the presence of the Honorable Henry L. Hess, United States Attorney, was noted, and proceedings herein were resumed and continued as follows:)

Direct Examination

By Mr. George Mowry:

Q. Your name is Clarence E. Culver?

(Testimony of Clarence E. Culver.)

A. Yes, sir.

Q. Now, you will have to keep your voice up a little bit. [28] A. Yes, sir.

Q. And you are at the present time a resident of Portland? A. Right.

Q. Vanport—or Guild's Lake?

A. Guild's Lake.

Q. And you are employed by whom?

A. By the Electric Steel Foundry.

Q. Now, did you formerly work for Kaiser Company, Inc., at their Swan Island Shipyard?

A. Yes, sir.

Q. When did you come to the State of Oregon?

A. February 25, 1943.

Mr. Rockwood: Nineteen forty—what?

Mr. George Mowry: '43. You said '43?

A. Yes.

Q. Keep your voice up, Mr. Culver, and answer audibly.

The Court: February 25, 1943, is that correct?

Mr. George Mowry: I think that is right, isn't it? A. Right, yes, sir.

Q. Speak a little louder. Now, what is the fact as to whether you came out here at the request of anybody?

A. By the Kaisers, who was soliciting help.

Q. In Oklahoma? A. Yes.

Q. I see. And, not to go into any great detail, if I may ask [29] a leading question or two, when you came out here you went to work for the Oregon Shipbuilding Corporation? A. Yes, sir.

(Testimony of Clarence E. Culver.)

Q. Immediately after you got here?

A. Yes, sir.

Q. And you worked for them for about how long?

A. With the Oregon Shipbuilding?

Q. Yes.

A. Until July, or June—about June, I would say in June.

Q. 1943? A. Right.

Q. Then when did you go to work for the Kaiser Company, Inc.? A. Swan Island?

Q. At Swan Island?

A. July—approximately July 25th—or approximately.

Q. July what? I believe you have the copy of the payroll or the record submitted by the Kaiser Company, Inc.? A. Yes.

Q. And their record shows you went to work as a guard on July 24th, 1943? A. Yes.

Q. At a pay of 95 cents per hour?

A. Right.

Q. That is correct, is it? A. Right. [30]

Q. Now, when you went to work for the Kaiser Company, Inc., in July of 1943, did you have another job at that time—up to that time? A. Yes.

Q. And, without going into a lot of detail, it wasn't a shipbuilding job? A. No.

Q. And whom did you consult about getting this job as a guard at Swan Island?

A. Clarence Krause.

Q. No, I mean who did you consult at the Yard?

(Testimony of Clarence E. Culver.)

A. Captain Utley.

Q. Captain Utley; and he is Captain of what there? A. Captain of the guards.

Q. He was at that time? A. Yes.

Q. And in the conversation you had with him did he say he would give you a job as a guard?

A. Yes.

Q. And how long after that conversation was it that you went to work as a guard?

A. Oh, three or four days.

Q. Now, before you actually went to work as a guard did you have any further conversations with Captain Utley? A. Before I went to work? [31]

Q. Yes. A. Yes.

Q. And what is the fact as to whether he gave you certain instructions as to what your duties were to be and what shift you were to be on, and other instructions of that kind? A. Yes.

Q. Speak up a little bit louder. Now, what is the fact as to whether he also instructed you at the same time upon any other subject aside from your general duties? A. The question again, please?

Q. I say, did he give you instructions on other subjects aside from your shift, and so on?

A. Yes.

Q. And about what?

A. Reporting for roll call.

Q. And what instructions did he give you about reporting for roll call?

A. To report thirty minutes before going on duty.

(Testimony of Clarence E. Culver.)

Q. I can't hear you very well. Thirty minutes before going on duty? A. Yes.

Q. And, incidentally, what shift did he assign you to? A. The graveyard shift.

Q. And the graveyard shift for the guards was to commence at what hour?

A. At 12:00 o'clock. [32]

Q. Midnight? A. Right.

Q. And was to last until what hour?

A. 8:00 o'clock A.M.

Q. And his instructions to you, as I understand it, were to report for roll call half an hour prior to midnight? A. 11:30, yes.

Q. I see. Well, now, you then went to work as a guard? A. Yes.

Q. On the graveyard shift? A. Yes.

Q. It that right? A. Right.

Q. Now, just to get a little picture of the premises there, you were living at that time at what place? A. Vanport.

Q. What? A. Vanport City.

Q. Now, Vanport is quite a ways north of Swan Island? A. Yes.

Q. Now, incidentally, Swan Island is located in the City of Portland? A. Yes.

Q. On the east bank of the Willamette River, is that right? A. Right. [99]

Q. And as you went to work, from day to day, or night to night, approaching Swan Island which way did you go into it, from the east or the west?

A. From the east.

(Testimony of Clarence E. Culver.)

Q. And I believe you cross the Union Pacific Railroad tracks as you go? A. Yes.

Q. And when you get across the tracks what is the fact as to whether you are then on the premises of the Kaiser Company, Inc., Swan Island Shipyard properties? A. Yes.

Q. And you might mention, briefly, some of the buildings that you pass on your way to where you reported for this roll call. Incidentally, where did you report for the roll call, what building?

A. At the guard office.

Q. At the guard office. Now, what buildings of Kaiser Company, Inc., at Swan Island did you pass as you went on to this guard office?

A. On the right?

Q. Yes, on the right-hand side?

A. The first buildings would be the gas buildings.

Q. The what? They would be what?

A. The acetylene gas buildings.

Q. Well, it would be the oxygen gas building?

A. Yes, the oxygen gas building.

Q. Which is maintained there by the company?

A. Yes.

Q. All right, what else?

A. The vocational building.

Q. The Vocational building. A. Yes.

Q. That, as you proceed west, is on the right-hand side? A. On the right-hand side.

Q. And what do they do in the Vocational building?

(Testimony of Clarence E. Culver.)

A. I am sure that is where the welders, and possibly others, received their training.

Q. All right, what is the next building you went to as you went west?

A. I would say the Child's Center.

Q. And that is for what?

A. Where the parents left their children, who were working in the Yard.

Q. And then as you proceeded along to the west I believe you turned to the north then?

A. Yes.

Q. And you passed what other buildings then?

A. The dormitories is on the right.

Q. Well, what other buildings?

A. The cafeteria. [101]

Q. The cafeteria where the workers were fed?

A. Got their meals, yes.

Q. I see. And then what other principal buildings did you pass before you got to your guard office? A. The Administration buildings.

Q. How many of them? A. There's two.

Q. Two. And which one is the main Administration building? A. I believe the second one.

Q. The second one? A. Yes.

Q. And that is about how close to the guard office? A. Oh, I would say half a city block.

Q. Half a block? A. Approximately.

Q. Now, I will ask you this, Mr. Culver: You worked there from the time you went to work as a guard there at the Swan Island Shipyards of

(Testimony of Clarence E. Culver.)

the defendant—you worked there how long? Now, it was late July——

A. From July, '43, until February of '45.

Q. That is February, what date?

A. The 27th, I believe.

Q. February 27th, 1945. And what is the fact as to whether your employment there was practically continuous? A. Pardon? [36]

Q. Was your employment there continuous during that period? A. Yes.

Q. And what shifts did you work on?

A. The graveyard shift.

Q. And only the graveyard shift?

A. Only the graveyard.

Q. Now, I will ask you, if it is a fact, as to whether or not this instruction which Captain Utley gave you at the beginning about reporting for roll call half an hour early was ever changed in any way? A. No.

Q. Or modified? A. No.

Q. Or withdrawn? A. No.

Q. And I will ask you what is the fact as to whether during the entire period that you worked there, or on any night that you went to work—it was a midnight job, as I understand it—what is the fact as to whether invariably you first appeared at a roll call? A. Yes.

Q. And that roll call, with the attending circumstances, lasted about how long?

A. Oh, approximately eight to twelve or fifteen minutes.

(Testimony of Clarence E. Culver.)

Q. Now, what is the fact as to whether from the time the roll [103] call started you ever left the premises known as the Swan Island Shipyards?

A. No.

Q. Not until the end of your shift? A. No.

Q. You were on the premises continuously?

A. Yes.

Q. I see; and what is the fact as to whether you have never been paid any portion whatever of any wages for this half hour—— A. No.

Q. ——that occurred—wait a minute—for the first half hour after the beginning of roll call?

A. No.

Mr. George Mowry: Could I have that question read, your Honor?

The Court: Yes, read the question.

Mr. George Mowry: Will you read it, Mr. Rauch.

(The question referred to and the answers thereto were thereupon read.)

Mr. George Mowry: That is all right.

Q. Now, Mr. Culver, I believe those figures which you agreed to that were submitted by the Kaiser Company show that after going to work on July 24th as a guard as 95 cents per hour you then, on October 4, 1943, were given $1.05 an hour for the same services as a guard? A. Yes. [38]

Q. Is that right? A. That is right.

Q. And that rate of $1.05 per hour as a base pay then continued until you finally quit or were laid off February 27, 1945, is that true?

(Testimony of Clarence E. Culver.)

A. That is right.

Q. Now, then, you have made some computation of the wages or the money that you would be entitled to for this extra half hour at the rate at which you were being paid during those respective periods, have you not? A. Have what?

Q. You have—it has been brought to your attention—— A. Yes.

Q. ——what your entire wages would have been for that half hour at the hourly rates which you were getting at those times? A. Yes.

Q. What is that amount, approximately?

A. Four hundred twenty-eight dollars and some cents.

Q. I think the figure is seventy-two cents,—$428.72. Now, have you ever been paid any part of that figure? A. Pardon?

Q. How is that? A. The question, again?

Q. I say, have you ever been paid any part of that amount? A. No [39]

Mr. George Mowry: Now, Mr. Culver,—will you show this writing to the witness.

The Bailiff: Do you want it marked for identification?

Mr. George Mowry: Yes, I would like to have it marked for identification, with the understanding that it may be withdrawn and copy submitted, your Honor.

(Letter bearing date March 27, 1946, Mowry & Mowry, to C. E. Culver, so produced, was thereupon marked for identification as Plaintiff's Exhibit 1.)

(Testimony of Clarence E. Culver.)

Q. (By Mr. George Mowry): I ask you to look at Plaintiff's 1 for identification and see if that is your signature under the word "Approved"?

A. Yes.

Q. And that letter is dated as of March 27th, is it not, 1946? A. Yes.

Q. It is dated up in the right-hand corner.

A. 1946, yes.

Q. How? A. Yes.

Q. Speak a little louder. What date is it?

A. 1946.

Q. What month?

A. March, the best I can see without my glasses.

Q. Oh, I see. I think it is March 27th. [40]

A. 27th, yes, that is correct.

Mr. George Mowry: 1946. Would your Honor like for me to read that letter to your Honor?

The Court: No. I can read.

Mr. George Mowry: Yes, I appreciate that. I thought—it is a short letter. It simply sets out that the Company has agreed——

The Court: Do you want to put it in evidence?

Mr. George Mowry: We offer it in evidence.

Mr. Rockwood: May I see it, please?

Mr. George Mowry: Certainly.

The Court: Show it to Mr. Rockwood.

Mr. Rockwood: We don't object to the receipt of this exhibit in evidence. However, there are some statements in there that we do not consider binding on the defendant. There is a possibility of, maybe,

(Testimony of Clarence E. Culver.)

a little ambiguity as to the extent of this compromise setttlement. There is no mention in there of the question of liquidated damages, and this settlement is in settlement of all claims, overtime and liquidated damages, but the letter which is addressed to this witness does not mention the question of liquidated damages.

The Court: Admitted.

(The letter referred to, so offered and referred to, having previously been marked for identification, was thereupon marked received as Plaintiff's Exhibit 1.) [41]

PLAINTIFFS' EXHIBIT No. 1

Law Firm of Mowry & Mowry
1218 Failing Building
Portland 4, Oregon

March 27, 1946

[In Pencil]: 5147 Buena Ave.,
Guilds Lake, Portland.

Mr. C. E. Culver
7824 S. E. Lambert
Portland, Oregon

Re: Macklin, et al, v.
Kaiser Co., Inc. No. 3000

Dear Sir:

The back wages due you, and the fifty-one other plaintiffs in the above-entitled Federal Court suit,

(Testimony of Clarence E. Culver.)

from the Kaiser Co., Inc., for your work at the Swan Island Shipyard have now been approved in writing by the United States Maritime Commission. The amount that has been approved in respect to yourself is the sum of $428.42. According to the figures presented to us from the books of Kaiser Co., Inc., this is the amount in full of all of your unpaid minimum wages and unpaid overtime compensation. From this amount, however, will, of course, be deducted the amounts for your withholding tax and Social Security reservations.

If you are willing to accept this amount, as above computed, in settlement, please write your signature under the word "Approved" at the bottom of this letter and return the letter, as thus signed, to us promptly, as we wish to be able to present such letters to the Federal Court at the time the settlement is finally submitted to that Court.

As soon as this settlement is approved by the Federal Court individual releases will be mailed to you and the others and upon return of your release at that time you will receive your check for the amount agreed upon.

Very truly yours,

MOWRY & MOWRY,

By /s/ GEORGE MOWRY.

Approved:

/s/ C. E. CULVER.

Received.

[Endorsed]: Filed April 23, 1946.

(Testimony of Clarence E. Culver.)

Mr. George Mowry: Now, I wonder if you gentlemen—Mr. Rockwood, I wonder if you gentlemen would be willing to stipulate that we have here fifty other letters from fifty other guards in the identical form, signed by them?

Mr. Rockwood: Well, if I may see them I will so stipulate.

Mr. George Mowry: You may. There are forty-seven—it is the same amount as in the stipulation. There are forty-seven of them—pardon me just a minute—pardon me, here is the forty-eighth. I would appreciate it if you would keep those separate from each other. Here's forty-eight, forty-nine, fifty, fifty-one.

The Court: If you have the letters there, you will tender them in evidence.

Mr. George Mowry: I beg your pardon?

The Court: I say, if you have the letters there you will tender them in evidence.

Mr. Rockwood: Forty-six have been handed to me, according to my count. We haven't had an opportunity to check against the amounts stated with the amounts shown in the stipulation for judgment, nor have we had a chance to check the names of the individuals to whom these letters are addressed, or by whom signed, against the stipulation.

Mr. George Mowry: Well, you don't question the signatures?

Mr. Rockwood: No, no, not at all.

Mr. George Mowry: Now, if your Honor please,

(Testimony of Clarence E. Culver.)

he says there [42] are forty-six. There are forty-six in addition to the Culver letter in this file.

Mr. Rockwood: That is right.

Mr. George Mowry: And I presume we could offer them in evidence as one exhibit?

The Court: Yes.

(The forty-six letters referred to, all bearing date March 27, 1946, from Mowry & Mowry, addressed to the various plaintiffs listed below and contained in a folder, so offered and received, were thereupon marked received as Plaintiff's Exhibit 2: O. L. Rawls, John H. VanHook, J. C. Cronin, E. R. Johnson, Arthur E. Johnson, W. C. Griffin, Geo. F. Nickels, Geo. W. Hess, Marion M. Long, O. P. Bjorsgaard, James O. Bryant, Herbert J. Carlyle, H. E. Carr, [43] B. L. Cash, L. W. Collier, Dan J. Chase, Thomas W. Craig, W. J. Cox, G. G. Dean, George E. Dopp, Arthur E. Glennon, H. O. Hanson, John J. Hill, John T. Holden, W. G. Imus, James J. Knox, Claude F. Krigbaum, Orval L. Lancaster, Len A. Maple, Lee Mainard, Theodore S. Maynard, C. H. Monrean, R. L. Nordeide, Roy J. Penniwell, John Popma, Scott M. Rogers, J. H. Stoneman, Eric E. Sundberg, [44] W. T. Taulbee, Arthur B. Todd, L. O. True, Clinton A. Warriner, H. J. Weigel, Milton F. Williams, Chas. J. Wilson, and Richard F. Yeo.)

(Testimony of Clarence E. Culver.)

PLAINTIFFS' EXHIBIT No. 2

Law Firm of Mowry & Mowry
1218 Failing Building
Portland 4, Oregon

March 27, 1946

Mr. O. L. Rawls
Bldg. 2910—Apt. 3772
No. Broadacres
Vanport City
Portland 17, Oregon

Re: Macklin, et al. v.
Kaiser Co., Inc. No. 3000

Dear Sir:

The back wages due you, and the fifty-one other plaintiffs in the above-entitled Federal Court suit, from the Kaiser Co., Inc., for your work at the Swan Island Shipyard have now been approved in writing by the United States Maritime Commission. The amount that has been approved in respect to yourself is the sum of $334.41. According to the figures presented to us from the books of Kaiser Co., Inc., this is the amount in full of all of your unpaid minimum wages and unpaid overtime compensation. From this amount, however, will, of course, be deducted the amounts for your withholding tax and Social Security reservations.

If you are willing to accept this amount, as above computed, in settlement, please write your signature under the word "Approved" at the bottom of this letter and return the letter, as thus signed, to us promptly, as we wish to be able to present such letters to the Federal Court at the time the settle-

(Testimony of Clarence E. Culver.)

ment is finally submitted to that Court.

As soon as this settlement is approved by the Federal Court individual releases will be mailed to you and the others and upon return of your release at that time you will receive your check for the amount agreed upon.

Very truly yours,

MOWRY & MOWRY,

By /s/ GEORGE MOWRY.

Approved:

/s/ O. L. Rawls.

["Exhibit 2 also includes identical letters to John H. Van Hook, J. C. Cronin, E. R. Johnson, Arthur E. Johnson, W. C. Griffin, George F. Nickels, George W. Hess, Marion M. Long, O. P. Bjornsgaard, James O. Bryant, Herbert J. Carlyle, H. E. Carr, B. L. Cash, L. W. Collier, Dan J. Chase, Thomas W. Craig, W. J. Cox, G. G. Dean, George E. Dopp, Arthur E. Glennon, H. O. Hanson, John J. Hill, John T. Holden, W. G. Imus, James J. Knox, Claude F. Krigbaum, Orval L. Lancaster, Len A. Maple, Lee Mainard, Theodore S. Maynard, C. H. Monrean, R. L. Nordeide, Roy J. Penniwell, John Popma, Scott M. Rogers, J. H. Stoneman, Eric E. Sundberg, W. T. Taulbee, Arthur B. Todd, L. O. True, Clinton A. Warriner, H. J. Weigel, Milton F. Williams, Chas. J. Wilson and Richard F. Yeo."]

Received.

[Endorsed]: Filed April 23, 1946 U.S.D.C.

[Endorsed]: Filed Oct. 16, 1950 U.S.C.A.

(Testimony of Clarence E. Culver.)

Mr. George Mowry: Now, here, Mr. Rockwood, are the forty-eighth, forty-ninth, fiftieth and fifty-first.

Mr. Rockwood: Mr. Mowry, you will stipulate that those letters were written by you and addressed to the claimants, and, to the best of your knowledge, they are their signatures?

Mr. George Mowry: Oh, I will testify that they are their signatures.

Mr. Rockwood: You state that these are the forty-eighth, forty-ninth and fiftieth?

Mr. George Mowry: That is right.

Mr. Rockwood: One of these that you handed to me, which is a form letter similar to the others, is apparently signed by Mr. Warrick.

Mr. George Mowry: Yes.

Mr. Rockwood: Another is a letter, in similar form, apparently signed by Mr. Peddicord.

Mr. George Mowry: Yes. [45]

Mr. Rockwood: Then the two files, one relating to Hunt and the other one relating to L. I. Macklin, the named plaintiff.

Mr. George Mowry: Macklin is in there in an envelope.

Mr. Rockwood: That is right, there is a form letter for Macklin, but none for Hunt.

Mr. George Mowry: No. Now, so far as Mr. Hunt is concerned, as some of you gentlemen know—Mr. Tongue knows this—my brother had an oral conversation with Mr. Hunt in which he approved those figures that you have submitted, and we simply haven't heard from Hunt—he is in the Army—but

(Testimony of Clarence E. Culver.)

my brother will testify that Mr. Hunt approved the amount that you gentlemen submitted, and we expect, of course, to get his written approval. Really, we had fifty formal approvals, and Hunt's, we are prepared to testify, is authentic in that he has approved it orally, and we have written him, and we offer these four files in evidence, that is, the forty-eighth letter and the forty-ninth letter, the fiftieth and the fifty-first, Mr. Macklin's.

Mr. Rockwood: We should point out that there are other papers in those files than the letters referred to.

Mr. George Mowry: Well, then I will just put the letters in. There's Warrick, Peddicord—Perry Hunt I think we have covered with a statement already. He hasn't yet got a formal letter in, but we are prepared to say that he is willing to accept that [46] settlement which you offered. That makes the fifty-first, Mr. Macklin.

(The three letters referred to, all dated March 27, 1946, signed Mowry & Mowry, addressed to Alfred F. Warrick, W. F. Peddicord and L. I. Macklin, so offered and received, were thereupon marked received, respectively, as Plaintiffs' Exhibits 3, 4 and 5.)

["Exhibits 3, 4 and 5 are identical with Exhibit 1 except that they consist of letters to Alfred F. Warrick, W. F. Peddicord and L. I. Macklin."]

The Court: I notice there is included in this exhibit number 2 a letter from Warriner, who I understand has been dismissed.

(Testimony of Clarence E. Culver.)

Mr. George Mowry: That is true, your Honor.

The Court: And how about Fader?

Mr. George Mowry: Fader, his letter has been returned unclaimed and his case has been dismissed.

The Court: And how about Warriner?

Mr. George Mowry: The Warriner case has been dismissed, for the reason that he did not send back his withholding tax certificate.

The Court: All right.

Mr. George Mowry: We are perfectly willing, of course, to withdraw the Warriner letter.

The Court: No, it is in there; it won't hurt.

Mr. George Mowry: If your Honor please, I seem to have mislaid this Culver file. I have an exhibit in there that I [47] want to put into evidence. I suppose it is in this brief case. I have it.

Q. Now, Mr. Culver, after you quit this job, I believe you said February 27, 1945, what are the facts as to whether then you gave some thought to the matter of this thirty minutes that you had been putting in connection with this roll call?

A. I would say it was in May.

Q. I say, you gave some thought to it?

A. Yes.

Q. Now, without stating what is in any letter, what is the fact as to whether you wrote to anybody about that thirty minutes, to see whether you were entitled to compensation for it? A. Yes.

Q. And who did you write to?

A. To the Wage and Hour Office at Washington, D. C.

(Testimony of Clarence E. Culver.)

Q. At Washington, D. C.? A. Yes.

Q. And, without stating what you said in your letter or what their reply was, did you receive a reply to that letter? A. Yes.

Q. And do you still have that reply?

A. Yes.

Q. Now, you say you wrote the letter on what date? A. About March 20th. [48]

Q. May 20th? A. May 20th, yes.

Q. And this letter which you received in response, I will ask you what was done with that letter after you got it? What did you do with it? Did you turn it over to somebody? A. Yes.

Q. Who? A. Mr. Rawls.

Q. Mr. Rawls; he is one of the plaintiffs in this case? A. One of the guards, yes.

Q. Is he still employed at Swan Island?

A. Yes.

Q. And what is the fact, if you know, as to whether that letter was circulated, the letter and this reply which you got, were circulated among the men, the guards, at Swan Island?

A. Yes, it was.

Q. And copies were made of it?

A. Copies were made.

Q. And from the conversations that you had with your men and associates and the officials, what is the fact as to whether that letter which you received was brought to the attention of some of the officials of Kaiser Company, Inc.?

A. You mean how do I know it was brought to their attention?

(Testimony of Clarence E. Culver.)

Q. I say, is it a fact that it was brought to their attention? A. It was, yes. [49]

Q. And the Maritime Commission?

A. Yes.

Mr. George Mowry: Now—if you would like to see that letter—(handing same to Mr. Rockwood). Now, if your Honor please——

Mr. Rockwood: We have no objection. Of course, we are not bound by any statements which appear to be conclusions of law.

Mr. George Mowry: That is just what I was just going to say. I haven't even offered it, but, since they are willing to have it put in, I will put it in.

The Court: Admitted.

(Letter referred to, bearing date June 13, 1945, Charles H. Elrey, Branch Manager, U. S. Department of Labor, Wage and Hour and Public Contracts Divisions, 208 U. S. Court House, Old, Portland 4, Oregon, to Mr. C. E. Culver, with encolsure, so offered and received, was thereupon marked received as Plaintiffs' Exhibit 6.)

Q. (By Mr. George Mowry): Now, what is the fact as to whether you also wrote a letter in regard to this claim of yours to the United States Maritime Commission directly? A. Yes.

Q. And asking for payment?

A. Yes. [50]

Q. And did you receive a reply to that letter?

A. From the Kaiser attorneys.

(Testimony of Clarence E. Culver.)

Q. The reply came from the Kaiser Company, Inc.? A. That is right.

Q. That was about September 7, 1946?

A. Yes.

Mr. George Mowry: '45—pardon me. Now, here is the rejection from the Kaiser Company. We offer that in evidence.

Mr. Rockwood: No objection.

Mr. George Mowry: I will ask you to show the letter to the witness, and will you ask him if that is the letter he received from the Kaiser Company?

A. Yes.

Q. I ask you, is that the letter you received from the Kaiser Company? A. Yes.

The Court: Admitted.

(Said letter, bearing date September 7, 1945, Kaiser Company, Inc., Portland Yard, to C. E. Culver, so offered and received, was thereupon marked received as Plaintiffs' Exhibit 7.)

Q. (By Mr. George Mowry): Now, Mr. Culver, the letter you received from the Kaiser Company is dated September 7, 1945. I will ask you if it is a fact that shortly after that you and some of the other guards conferred with my brother and myself, composing the firm of Mowry & Mowry? [51]

A. Yes.

Q. And I believe there was a retainer fee of $250 paid to us, is that true? A. Yes.

Q. And after we had looked into the law we and yourself and the other guards agreed upon a con-

(Testimony of Clarence E. Culver.)

tract upon which we would handle this case, is that true? A. Right.

Q. And this contract was signed by the guards involved, was it not? A. Yes.

Q. And you signed one of them? A. Yes.

Q. I will ask you if that is your signature and if you signed that contract? A. Yes.

Mr. George Mowry: We offer this contract in evidence.

Mr. Rockwood: May we see it, please, Mr. Mowry?

Mr. George Mowry: Yes.

Mr. Rockwood: I have no objection.

The Court: Admitted in evidence.

(Said communication, bearing date November 16, 1945, C. E. Culver to Mowry & Mowry, so offered and received, was thereupon marked received as Plaintiffs' Exhibit 8.)

PLAINTIFFS' EXHIBIT No. 8

Portland, Ore., Nov. 16, 1945.

Mowry & Mowry,
Attorneys at Law,
1218 Failing Building,
Portland, Oregon.

Gentlemen:

I hereby employ you to institute and prosecute for me in the proper Court or Courts an action for wages due me from Kaiser Company, Inc., under

(Testimony of Clarence E. Culver.)

the provision of the Fair Labor Standards Act of 1938, I to receive in full the amount of all my unpaid minimum wages and unpaid overtime compensation recovered; and I hereby agree to pay you as your compensation in said matter all additional amounts recovered as liquidated damages and/or as attorney fees under the provisions of said act; I also authorize you to employ any attorney or attorneys you see fit to assist you in the said matter, said attorney or attorneys to be paid entirely out of your compensation as herein set forth.

/s/ C. E. CULVER,

Residence Address: 7824 S. E. Lambert,
Phone, if any.....

Received.

[Endorsed]: Filed April 23, 1946.

["Exhibit 9 is identical with Exhibit 8 except that it relates to Len A. Maple."]

Q. (By Mr. George Mowry): At the time you—well, I will ask you [52] this: You have already testified about signing the approval of the amount of $428.42 less your deductions, for income tax and social security. A. Yes.

Q. I will ask you, now, are you individually satisfied and willing to accept the sum of $428.42,

(Testimony of Clarence E. Culver.)

less the income tax and social security deductions, in full settlement of your claim against the defendant? A. Yes.

Mr. George Mowry: I think that is all the direct examination.

Mr. Rockwood: If your Honor please, I do not consider that this is a trial of this case on the merits, and, though there are some questions which I might ask this witness if it were a trial on the merits, under the circumstances I will have no cross-examination.

Mr. Hess: Well, there is one question that I would like to ask, your Honor, as amicus curiae here in this case.

Cross-Examination

By Mr. Hess:

Q. Do you understand in your settlement that you are settling your claim in full in this case based upon your claim for overtime as well as liquidated damages? A. Yes.

Q. You understand that? A. Yes.

Mr. Hess: That is all. [53]

The Court: Well, during all the time that you worked for Kaiser Company, then, they did hold a roll call at 11:30? A. Yes.

The Court: And you attended every time?

A. Yes.

The Court: And how long is that, now?

A. You mean how long did I work?

The Court: Yes, for what period of time was that?

(Testimony of Clarence E. Culver.)

A. From July, '43 until February, '45.

The Court: And on those occasions were others present at that roll call besides you?

A. Yes.

The Court: And that was always held at 11:30?

A. Or a few minutes after. Approximately.

The Court: Never held at 12:00 o'clock?

A. No.

The Court: All right.

Mr. George Mowry: Any further questions?

Mr. Rockwood: I have none.

Mr. George Mowry: I guess that is all, Mr. Culver.

(Witness executed.)

Mr. George Mowry: If your Honor please, we have, I think, some seventeen or eighteen other guards here, if you wish us to call them.

The Court: You had better call some of them.

Mr. George Mowry: All right.

The Court: I am interested in establishing the facts.

Mr. George Mowry: That is right.

The Court: Because, as I understand it, the Government of the United States has an interest in this money.

Mr. George Mowry: We will call Mr. Hursel E. Carr. [55]

HURSEL E. CARR

one of plaintiffs herein, was thereupon produced as a witness in behalf of plaintiffs herein, and was examined and testified as follows:

The Clerk: How do you spell your first name?

A. (Spelling) H-u-r-s-e-l.

The Clerk: (Spelling) H-u-r-s-e-l?

A. Yes, sir.

The Clerk: (Spelling) C-a-r-r?

A. Yes, sir.

(The witness was then duly sworn.)

The Clerk: Hursel E. Carr.

Direct Examination

By Mr. George Mowry:

Q. Mr. Carr, you live where?

A. At Multnomah, Oregon.

Q. And are you at present employed?

A. No.

Q. Now, were you employed as a guard at the Swan Island Shipyards of Kaiser Company, Inc.?

A. Yes.

Q. You had occasion to go over these figures submitted by the Kaiser Company, Inc., from their payrolls in regard to the dates that you went to work and quit and your respective rates of pay per hour? A. I did. [56]

Q. All right. Now, those are correct, are they?

A. To the best of my belief, yes.

Q. And then I will ask you what you say as to

(Testimony of Hursel E. Carr.)

whether, to the best of your knowledge, you went to work, as disclosed by their records, on June 28, 1942, as a guard, at 87 cents an hour?

A. I did.

Q. And that on November 16, 1942, you were promoted to be a guard sergeant at a rate of $1.25 an hour? A. Yes.

Q. And on January 3d, 1943, you were a guard sergeant at the rate of $1.10 an hour?

A. I believe that is correct.

Q. In May, 1943, you quit?

A. That is right.

Q. October 28th, 1943, you went back as a guard at 95 cents per hour? A. Yes.

Q. December 27th, 1943, your pay as a guard was increased to $1.05 an hour? A. Yes.

Q. October 16, 1944, you became a senior guard at $1.15 an hour? A. I did.

Q. And on August 30, 1945, you were a guard at $1.05 an hour? A. That is right.

Q. And you were laid off on March 3d, 1946?

A. That is right.

Q. Now, I will ask you, what is the fact as to whether at all times you worked there as a guard—you worked, I believe, on all three shifts, did you not?

A. We had rotating shifts, yes, and at short period of time I worked on all three shifts.

Q. Now, I will ask you, what is the fact as to whether or not on any day or night that you worked you first appeared at a roll call? A. Yes.

(Testimony of Hursel E. Carr.)

Q. And who had told you to appear at that roll call?

A. The chief of the guards, Captain Utley.

Q. And when did he give you that instruction?

A. Before I went to work.

Q. And was that instruction ever varied or modified in any way? A. No.

Q. And were the other guards present at the same roll call? A. Yes.

Q. And how long was that roll call before you relieved the guard that you succeeded?

A. Thirty minutes before.

Q. Thirty minutes; and what is the fact as to whether or not you have ever—well, I will ask you this: What is the fact as to whether, after roll call started, did you leave the [58] premises until your shift was over? A. No.

Q. And what is the fact as to whether you have ever received any pay for any portion of the first thirty minutes after the beginning of the roll call?

A. Never.

Q. Oh, yes—you have approved this settlement, which awards you $550.05? I say, you have approved that, have you? A. I have approved——

Q. Do you know what the figure is?

A. Approximately five hundred and fifty.

Q. Yes, $550.05. And are you willing and satisfied to take that amount in full settlement of your claim? A. I am.

Q. I think that is all—that is, that would cover your back wages, your overtime, any liquidated

(Testimony of Hursel E. Carr.)

damages, and attorney fees? A. That is right.

Q. If you get this $550.05, less your income tax and social security deduction, is that right?

A. That is right.

Mr. George Mowry: You may cross examine.

Mr. Rockwood: No cross-examination.

Mr. George Mowry: All right, that is all.

(Witness excused.)

Mr. George Mowry: We will call Mr. Popma.

* * *

["Thereupon plaintiffs Popma, Craig, Williams, Maple, Hanson, Nordeide and Sundberg gave testimony substantially in accord with the testimony given by plaintiffs Culver and Carr."]

Afternoon Session

Mr. George Mowry: If your Honor please, might we call Mr. Sidney Graham, out of order?

The Court: Yes.

Mr. George Mowry: Mr. Graham.

SIDNEY GRAHAM

was thereupon produced as a witness in behalf of the plaintiffs' herein and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. George Mowry:

Q. Your name is Sidney Graham?

A. Yes.

(Testimony of Sidney Graham.)

Q. And you are an attorney at law?

A. Yes.

Q. And are admitted to the Bar of the State of Oregon? A. Yes.

Q. When were you admitted?

A. June, 1911.

Q. And have you been engaged actively in the practice of law ever since? A. Yes.

Q. And, for the most part, practically all of the while in the City of Portland? A. Yes.

Q. Now you, of course, are a member of the Bar of this Court? [81] A. Yes.

Q. The United States District Court?

A. Yes.

Q. The United States Circuit Court of Appeals for the Ninth Circuit? A. Yes.

Q. And the Supreme Court of the United States? A. Yes.

Q. You have been acquainted with myself and my brother here for many years?

A. Yes, perhaps twenty-five years.

Q. Yes, maybe so; and, of course, you are acquainted with Mr. Hicks and Mr. Tongue, who are associated with us in this case? A. Yes.

Q. And I will ask you what is the fact as to whether you are familiar with their standing at the bar and their abilities? A. I am.

Q. Now, you have been furnished, I believe, with a copy of the stipulation which was introduced in this case as to attorney fees? A. I have.

Q. And you have read that over?

(Testimony of Sidney Graham.)

A. I have.

Q. Well, now, to put it briefly, it appears from that stipulation that this is a case where the plaintiffs, who were fifty-two in number until it was dismissed without prejudice as to two of them [82] a few days ago, so that there are now fifty in number, are suing for wages and overtime pay and liquidated damages under the Act known as the Fair Labor Standards Act of 1938, which is found in Title 29, United States Code Annotated—I believe it is Section 207. You are familiar with that Act? A. Yes.

Q. Now, it appears from the stipulation that the great majority of these plaintiffs contacted at least some of the present attorneys for the plaintiffs early last fall, no later than sometime in September, and two of the present attorneys, that is, myself and my brother, were paid a retainer fee at that time of $250, and that we then negotiated with the resident attorney for the defendant, who, after taking the matter up with officials of the company, wrote us a letter in which he rejected the claim —and, incidentally, before we close the case I want to offer that letter in evidence. The matter was looked into at length by ourselves, making a study of the Fair Labor Standards Act and also of the Federal decisions, including decisions of the Supreme Court of the United States cited under that Act, and the United States Code Annotated, and when the claim was rejected, after we had had these questions of law up with the resident attorneys, my

(Testimony of Sidney Graham.)

brother and I consulted Mr. Tongue and Mr. Hicks with the idea of getting them to come into the case with us, which they did, and, therefore, since early last fall there have been four attorneys for these various claimants. The [83] stipulation shows that the complaint was filed on the 7th day of December, 1945. At that time there were thirty-four plaintiffs in the complaint. Within a short time, however, eighteen more plaintiffs were added by way of a supplemental complaint, which was filed on the 30th day of January, 1946, which made a total of fifty-two plaintiffs. Conferences between the attorneys for the plaintiffs and the attorneys for the defendant began early in January. I think there was one prolonged conference on the 4th day of January here in this city between those attorneys and some of the attorneys, at least, for the plaintiffs. From then on there were numerous conferences, and, finally, while these negotiations were going on, the defendant filed its answer; I think the date of filing the answer was February 18, 1946. That answer consists of a general denial, which placed in issue all of the allegations of the complaint. Incidentally, by the time the supplemental complaint was filed the pleadings on the plaintiffs' side amounted to something like thirty-four or thirty-five pages, and those allegations were placed in issue by this denial. Now, since then the negotiations have been carried on with the attorneys for the defendant to a very considerable extent. Mr. Johnson, one of the attorneys for the Kaiser

(Testimony of Sidney Graham.)

Company, resides in San Francisco. He has been up here numerous times, conferring with the attorneys for the plaintiffs in respect to the proposed settlement of this case. Now, it appears from the stipulation [84] the parties finally did agree upon the terms of a settlement. The action in its final form was to recover approximately $17,500 for these fifty-two men and a like amount in liquidated damages and a reasonable attorneys' fee. The settlement which was finally agreed upon provides that the men are to receive the full amount they have prayed for, in the first instance, that is, the full amount of approximately $17,500, and that an attorney fee is to be fixed by the Court. The record here shows that in entering into their contracts with ourselves the men agreed that we should have the liquidated damages in the event of a recovery, that they were to get the full amount of their original claim and that we would have the liquidated damages. Now, by the terms of this stipulation, we have agreed, as attorneys for the plaintiffs, all four of us have agreed to accept a certain amount as an attorneys' fee and that the men shall have the $17,500, approximately, and that that is all that will be paid by the Kaiser Company; that's the terms of the agreement, and it is, I think, all covered in this stipulation which you have.

Now, I will ask you, Mr. Graham, what is the fact as to whether or not, in your many years of practice, you have personally handled numerous

(Testimony of Sidney Graham.)

cases that involve amounts ranging from fifteen to twenty thousand to twenty-five thousand dollars, thirty thousand dollars, and upwards?

A. I have. [85]

Mr. Rockwood: Just a minute. I have no objection to the question. I want to make a slight correction in the statement that you made as to what our stipulation was.

Mr. George Mowry: Yes.

Mr. Rockwood: We stipulated to the entry of a judgment for this amount of seventeen-odd thousand and attorneys' fees in the sum of $3500. We did not stipulate in terms to pay attorneys' fees as might be fixed by the Court. You indicated that in your question.

Mr. George Mowry: That is a fair statement.

Mr. Rockwood: That is right. We stipulated to the entry of judgment for $3500 attorneys' fees.

Mr. George Mowry: That is absolutely true. There is no question about that. I think that is in the stipulation that Mr. Graham has read, but, whether or not that is the fact, Mr. Graham, now I will ask you whether or not it is a fact as to whether or not in your practice you also have personally charged and collected fees for legal services ranging from three to four to five thousand dollars and upwards? A. I have.

Q. Now, it is also stipulated that these negotiations with the attorneys for the defendant also resulted in conferences, and numerous conferences, between at least some of the attorneys for the fifty-

(Testimony of Sidney Graham.)

two plaintiffs, and of a very great number of the fifty-two plaintiffs there were conferences that were occurring [86] either in person or by telephone practically all the time for a period of the last six or seven months.

Now, taking into consideration the facts set forth in the stipulation and the character and extent of the services that have been performed and the novelty and, you might say, doubtfulness of the questions involved under an act which was not enacted until 1938 and under which, so far as I know, there has been no decision by the Supreme Court of the United States pertaining to guards such as these men were, guards at a shipyard, and taking into consideration the time that was necessarily spent in the handling of this case in behalf of the plaintiffs, taking into consideration the experience and standing of the attorneys for the plaintiffs and the ability of the attorneys for the defendant, taking into consideration the amount involved and the importance of the cause and the responsibility assumed by the attorneys for the plaintiffs, taking further into consideration that this case was taken by the plaintiffs' attorneys, except for this small retainer fee of $250, upon a contingent basis, so that if no recovery were had there would be nothing to pay any attorneys' fee at all outside of the $250 which has been already paid, taking into consideration the results attained by the plaintiffs' attorneys in bringing about this proposed settlement, which has been approved by the Maritime Commission and

(Testimony of Sidney Graham.)

by the Department of Justice, and also taking into consideration the amounts usually charged or awarded for similar services [87] of a similar character—and, by the way, you are familiar with the amounts charged and paid in this locality for such services, are you not? A. I think I am.

Q. All right, taking all of those things into consideration, what would you say would be a reasonable attorneys' fee to be allowed to the plaintiffs in this case?

A. In my opinion, a minimum reasonable fee would be one-fourth of the recovery, or the sum of approximately $4300.

Mr. George Mowry: You may cross-examine.

Mr. Rockwood: I have no cross-examination.

The Court: Mr. Hess?

Mr. Hess: No cross-examination, your Honor.

Mr. George Mowry: Thank you, Mr. Graham.

The Witness: May I be excused?

The Court: Yes, surely. Thank you for appearing.

(Witness excused.)

Mr. George Mowry: We will call Mr. Hanson.

* * *

The Court: Now, will you represent to the Court, Mr. Mowry, that the rest of these plaintiffs will all give similar testimony regarding the existence of the roll call?

Mr. George Mowry: The rest of those who are in Court will [101] give similar testimony. We

were able to locate eighteen of them today. The others——

The Court: Will you read the names into the record that you have in attendance?

Mr. George Mowry: Mr. M. M. Long is here, or should be. He has a claim of $241.22.

Mr. George W. Hess is here. He has a claim of $223.73.

Mr. George F. Nickels is here, with a claim of $130.64.

Mr. W. C. Griffin, with a claim of $142.24.

Mr. Arthur E. Johnson is here with a claim of $305.54.

Mr. E. R. Johnson is here, or should be, with a claim of $455.60.

Mr. John C. Cronin is here, with a claim of $531.02.

Mr. John VanHook is here, with a claim of $426.66.

I think that concludes them.

Mr. Hess: May I——

The Court: These witnesses, as I understand, you now represent to the Court, would testify that there was a roll call taken substantially each time, where they went on shift, substantially thirty minutes before the time, and that they remained on the premises until after the shift ended?

Mr. George Mowry: That is right, and up until March 1st, 1945.

Mr. Hess: If your Honor please, may I just ask Mr. Mowry if he would include in the record there that these witnesses would testify as the last ones

that have already taken the stand [102] that they understand that this is in full settlement not only of their wages with overtime, but liquidated damages and attorneys' fees?

Mr. George Mowry: Oh, yes, that is understood, subject to such attorneys' fees as the Court might allow.

Mr. Hess: Yes, I understand, but it includes all of those elements, liquidated damages and overtime?

Mr. George Mowry: Yes, it does.

Mr. Hess: As these others have testified?

Mr. George Mowry: They would so testify.

The Court: Now, is there any question, Mr. Rockwood, as to whether the Kaiser Company, Inc., is engaged in the production of goods for commerce and falls within the terms of the Fair Labor Standards Act?

Mr. Rockwood: There is in the instance of some guards. Some of these guards, if your Honor please, were working in barracks areas, dormitory areas, cafeteria areas, outside the fence. There is a dispute between the parties as to whether guards in such positions, on such posts, were engaged in commerce or the production of goods in interstate commerce. There is a dispute of law there.

The Court: And, in that regard, this settlement which is made in gross is for the purpose of covering those contingencies as well as the question as to the time?

Mr. Rockwood: Yes, sir. As I understand the facts, the [103] individual guards, with few excep-

tions, were on various posts throughout this period, and a guard one day might be working inside the fence, along the ways, we will say. Another day that same guard might be working over in Mock's bottom near the parking lot, outside the fence, and another day he might be working from some other post. Yes, that question of law will be disposed of by the settlement, as well as the disputed questions of fact.

The Court: There is no question about the main proposition that Kaiser Company, Inc., is itself in a business which would fall under the terms of the Fair Labor Standards Act?

Mr. Rockwood: That is correct. That is, their operation as a shipbuilding plant at Swan Island.

The Court: Yes. Have you anything to add for the record, Mr. Hess?

Mr. Hess: Yes, your Honor, I have. As far as an action under the Fair Labor Standards Act and against a Government cost-plus contractor, it is the duty of the United States Attorney to act in a supervisory capacity only of a cost-plus contractor. As United States Attorney I am not appearing on behalf of either party litigant, but only as amicus curiae in an advisory capacity to this Court. The United States Attorney's office has previously elected that the defense or settlement of this case be handled by private counsel for the defendant contractor, namely, Kaiser Company, Inc. The pleadings in this case and other papers have [104] been submitted by the United States Attorney's office to the Attorney General's office and the mat-

ter has been considered by the Maritime Commission, contracting agency on behalf of the Government. The Department of Justice has informed a dispute between the parties as to whether guards me that the Maritime Commission has indicated that the proposed settlement in full for overtime and liquidated damages in the sum of $17,352.08, and plus attorneys' fees in the amount of $3500, was satisfactory to the Maritime Commission. The case involves fifty-two plaintiffs, and since the indicated settlement and the indicated approval by the Maritime Commission, as the records will show, the case has been dismissed without prejudice as to two of these plaintiffs, and, therefore, the judgment should be reduced accordingly.

I might add here that all decisions as to whether claims against the cost-plus contractors are reimbursable by the United States, whether those claims are in the amount involved in the lawsuit or the amount claimed as counsel thinks, are questions to be decided by the contracting agency; that is, in this case, the Maritime Commission. The Department of Justice has no responsibility in connection with such decisions. Therefore, any supervision undertaken by the United States Attorney's office or any settlement made in this case is without any prejudice to any right that the Government may have relative to any claim that might be presented by the contractor against the United States through its contracting agency or otherwise [105] as a result of settlement and judgment order based thereon.

I might state here that counsel for both the plain-

tiffs and defendant have been very cooperative in furnishing material as requested by the United States Attorney's office in this case. However, I did not receive until just this afternoon in the mail the copies of this stipulation relative to what the attorneys for the plaintiffs would testify as to reasonable attorneys' fees, and I note a statement in here to the effect—it is in paragraph numbered 11, on page 3—"That plaintiffs' attorneys were successful in consummating a settlement of the action under which plaintiffs are to receive payments in the amount of $17,352.08, which said settlement has been approved by the United States Attorney and the United States Maritime Commission."

We realize that this is a judgment against Kaiser Company in its corporate capacity, and that if Kaiser Company has any rights against the Maritime Commission under its contracts they will be seasonably presented, but this proceeding will not dispose of that question.

The Court: There is one thing, Mr. Mowry, you did not exactly cover all of the plaintiffs in this case. In your statement you covered those who were in the court room. I think we should have some statement from you that similar testimony would be presented for all the plaintiffs.

Mr. George Mowry: Well, I am sure it would, your Honor. [106] I can say that. We have fifty who have approved those respective amounts in writing and those papers are in the court.

The Court: Well, I just wanted to know.

Mr. George Mowry: Yes, your Honor.

The Court: You have stipulated that the testimony would be the same as to those who have already testified?

Mr. George Mowry: Yes, we do, your Honor.

The Court: Now, one thing more: I am going to ask you as an attorney, are you actually charging the amount that is being allowed?

Mr. George Mowry: Are we charging——

The Court: Yes, are you going to collect the money?

Mr. George Mowry: Oh, yes, there is no doubt about that.

The Court: This allowance of attorneys' fees, from the angle of the Court, the Court will not permit attorney fees to be recovered by the plaintiffs in any case in which the attorney does not receive them.

Mr. Rockwood: If your Honor please, the attorneys' fees in the amount that we have stipulated, if approved by your Honor, will be paid by us to the plaintiffs' counsel, by the Kaiser Company, by draft payable to counsel. It will not be paid to the involved plaintiffs. The amounts necessary to satisfy the individual judgments obtained by each one of these plaintiffs will be paid off by draft to each individual plaintiff [107] and we will take his receipt in satisfaction of the judgment from each individual plaintiff, after making the necessary deduction for social security and withholding tax.

The Court: The Court is only, in this respect, satisfying the rule of this Court. The Court does

not permit a party to recover attorney fees which he does not pay to the attorney.

Mr. Rockwood: The amount will be paid to the attorneys, yes, sir.

The Court: Are there any other matters, then, or are you willing to submit this now on the record as made?

Mr. George Mowry: As we said a while ago, we thought we would like to put in that letter rejecting the claim.

The Court: Yes.

Mr. George Mowry: We offer in evidence this letter from Mr. Whitaker rejecting the claim.

Mr. Rockwood: No objection.

The Court: Admitted.

(Letter bearing date October 9, 1945, Frank L. Whitaker, Resident Attorney, Kaiser Company, Inc., to Mowry and Mowry, so offered and received, was thereupon marked received as Plaintiffs' Exhibit 10.)

Mr. George Mowry: The suggestion has been made that the letter from the Maritime Commission has not been received in evidence, and I wondered if your Honor thought that should be in?

Mr. Tongue: We do not insist on it, your Honor, unless the Court feel it advisable that we have it as part of the record.

The Court: Where is it?

Mr. Rockwood: I have it here. I am sure I have it here. At the moment all I can put my hand on is a photostat copy of the letter and a photostat

copy of the telegram. Somewhere in my papers I have the original.

The Court: Won't that be sufficient?

Mr. Tongue: That will be satisfactory.

Mr. Rockwood: Then I will offer in evidence a photostat copy of a letter from the United States Maritime Commission, by Mr. Wade H. Skinner, General Counsel, March 29, 1946, addressed to the firm of Thelen, Marrin, Johnson & Bridges, San Francisco, to the attention of Mr. Gordon Johnson.

(The photostatic copy of letter referred to, so offered, was thereupon marked received as Defendant's Exhibit 11.)

DEFENDANT'S EXHIBIT No. 11

United States Maritime Commission
Washington 25, D. C.

March 29, 1946

Thelen, Marrin, Johnson & Bridges
111 Sutter Street
San Francisco, California.

Attention: Gordon Johnson, Esq.
Subject: Macklin et al. v. Kaiser Company, Inc.

Gentlemen:

Confirming our telegram to Mr. Johnson of March 26, 1946, this will advise you that the Maritime Commission on that date approved the pro-

posed settlement of above case by entry of judgment in the sum of $17,352.08 agreed to be owing to the plaintiffs as overtime compensation under the Fair Labor Standards Act. The Commission also approved payment in this case of plaintiffs' attorneys' fees of $3,500.00.

The Commission simultaneously authorized settlement on the same basis of other suits that may be brought by plant guards involving substantially similar fact situations, with plaintiffs' attorneys' fees agreed on by the parties as follows: From $17,500 to $40,000, 7% or $1575; from $40,000 to $60,000, 5% or $1,000; from $60,000 to $80,000, 4% or $800; from $80,000 to $100,000, 2½% or $500; over $100,000, 1%.

Kindly advise this office of the disposition of the case, and favor us with a copy of the judgment entered therein.

Very truly yours,

/s/ WADE H. SKINNER,
General Counsel.

Received.

[Endorsed]: Filed April 23, 1946.

Mr. Rockwood: I also offer in evidence photostat copy of a telegram from Paul D. Page, Jr., of the United States Maritime Commission, whom I personally know to be the Solicitor of the Maritime Commission—Paul D. Page, Jr., to Mr. Johnson at the Multnomah Hotel, Portland.

The Court: Received in evidence.

(Said photostat copy of telegram, bearing date March 26, 1946, Paul D. Page, Jr., to Gordon Johnson, so [109] offered and received, was thereupon marked received as Defendant's Exhibit 12.)

DEFENDANTS' EXHIBIT No. 12

[Telegram]

Portland, Oregon, 1946 Mar 26 PM 5
PRAS54 20/19 Govt 2 Extra PD Portland Org 26 430P
Gordon Johnson
Multnomah Hotel Ptld
Re Macklin Versus Kaiser Company. Commission Today Approved Entry of Judgment $17,352.08 and Attorneys' Fees of $3,500.

PAUL D. PAGE, JR.,
U. S. Mar Comm, Wash DC.

$17,352.08 $3,500.

Received.

[Endorsed]: Filed April 23, 1946.

Mr. Rockwood: I have the originals here. I have just found them among my papers.

The Court: If there is no objection, we will just leave these——

Mr. George Mowry: No objection.

The Court: Anything further?

Mr. Rockwood: I have nothing further.

The Court: The Court directs that a transcript in this case will be filed at the cost of the parties, and the Court will take the matter under advisement, this being a case of novel impression, and the Court wishes to be sure that the procedure is correct. In future cases I may follow a modified procedure to what has been adopted in this case. In this case I have been proceeding more or less by rule of thumb. As soon as the transcript is out I will write a short opinion, in which I will cover the situation and make the determination at that time approving settlement.

Is there anything further?

Mr. Rockwood: Mr. Johnson suggestions that we stipulate that the amount of costs may be included in the judgment, and we are willing, with your Honor's permission, for it providing that the cost of the transcript shall be paid for by the defendant, without a change in the stipulation relating to the costs and judgment. [110]

The Court: Yes.

Mr. George Mowry: I would like to say one thing, your Honor——

The Court: Yes.

Mr. George Mowry: ——and that is, of course, it goes without saying that this contract with ourselves, whereby we were to get the liquidated damages will be purely thrown aside by the award of any attorneys' fees that your Honor sees fit to award. In other words, the only attorney fee we

are getting will be what your Honor awards, other than the $250 that we have already received.

The Court: Yes, that is what I had assumed.

Mr. George Mowry: Yes, your Honor.

The Court: No further matters? Court will be in adjournment until tomorrow morning at 10:00 o'clock.

(Whereupon, at 3:05 o'clock p.m., Tuesday, April 23, 1946, proceedings in the above-entitled cause were concluded.) [111]

Reporter's Certificate

I, Cloyd D. Rauch, a Court Reporter of the above-entitled Court, duly appointed and qualified, hereby certify that I reported in shorthand proceedings had at the trial of the above-entitled cause, that I subsequently caused my said shorthand notes to be reduced to typewriting, and that the foregoing transcript, consisting of one hundred eleven pages, numbered 1 to 111, both inclusive, constitutes a full, true and accurate transcript of said proceedings, so taken by me in shorthand, and the whole thereof.

Dated this 9th day of May, A.D. 1946.

/s/ CLOYD D. RAUCH,
Court Reporter.

[Endorsed]: Filed May 9, 1946 U.S.D.C.

[Endorsed]: Filed Oct. 16, 1950 U.S.C.A.

In the District Court of the United States
for the District of Oregon

No. Civ. 3000

L. I. MACKLIN, et al.,

Plaintiffs,

vs.

KAISER COMPANY, INC.,

Defendant.

Before: Honorable James Alger Fee,
Judge.

Appearances:

THOMAS H. TONGUE III,
Of Attorneys for Plaintiffs;

HART, SPENCER, McCULLOCH &
ROCKWOOD, by

FLETCHER ROCKWOOD,
Of Attorneys for Defendant.

HENRY L. HESS,
United States Attorney.

TRANSCRIPT OF ORAL OPINION

The Court: I have asked the attorneys in the case of L. I. Macklin vs. Kaiser Company, Inc., to be present in court. I have a short memorandum upon that matter, which I will simply announce here.

This is an action under the Fair Labor Standards

Act to recover for overtime, liquidated damages and attorneys' fees for fifty-two plaintiffs who acted as guards for Kaiser Company, Inc., in its Portland shipyards. There has been a stipulation entered into by the parties and approved by the Maritime Commission as to the amount to be paid each plaintiff and the attorneys. This is not, however, payment in full of the amount claimed by each together with the liquidated damages approved by the statute. There is another dispute, also, which is shown by the record, which is also compromised. The Court at page 103 of the record, says as follows:

"Now, is there any question, Mr. Rockwood, as to whether the Kaiser Company, Inc., is engaged in the production of goods for commerce and falls within the terms of the Fair Labor Standards Act?"

"Mr. Rockwood: There is in the instance of some guards. Some of these guards, if your Honor please, were working in barracks areas, dormitory areas, cafeteria areas, outside the fence. There is a dispute between the parties as to whether guards in such positions, on such posts, were engaged in commerce or the production of goods in interstate commerce. There is a dispute of law there.

"The Court: And, in that regard, this settlement which is made in gross is for the purpose of covering those contingencies as well as the question as to the time?

"Mr. Rockwood: Yes, sir. As I understand the facts, the individual guards, with few exceptions, were on various posts throughout this period, and

a guard one day might be working inside the fence, along the ways, we will say. Another day that same guard might be working over in Mock's Bottom near the parking lot, outside the fence, and another day he might be working from some other post. Yes, that question of law will be disposed of by the settlement, as well as the disputed questions of fact.

"The Court: There is no question about the main proposition that Kaiser Company, Inc., is itself in a position which would fall under the terms of the Fair Labor Standards Act?

"Mr. Rockwood: That is correct. That is, their operation as a shipbuilding plant at Swan Island."

In view of the claim which will ultimately be for consideration of such matters in determining the liability of the United States to Kaiser Company, Inc., in relation to its construction of certain ships, this whole matter is of public interest. The Court, therefore, ordered that there be a trial to determine whether the stipulation should be approved. Testimony was taken and the matter was thoroughly reviewed. The transaction was fair and regular and an appropriate settlement was arrived at which the Court would approve without question if it were not for certain factors which now require further examination in view of recent developments. Since the Court took this matter under advisement the Supreme Court of the United States has handed down an opinion in the case of D. A. Schulce, Inc., Petitioner, vs. Salvatore Gangi, suing on behalf of himself and other employees similarly situated. This opinion was announced by Mr. Justice Reed on

April 29, 1946. The Court will not review the case, except simply to call it to your attention and to direct attention to a paragraph or so.

"In a bona fide adjustment on coverage, there are the same threats to the public purposes of the Wage-Hour Act that exist when the liquidated damages are waived. The damages are at the same time compensatory and an aid to enforcement. It is quite true that the liquidated damage provision acts harshly upon employers whose violations are not deliberate but arise from uncertainties or mistakes as to coverage. Since the possibility of violations inheres in every instance of employment that is covered by the Act, Congress evidently felt it should not provide for variable compensation to fit the degree of blame in each infraction. Instead Congress adopted a mandatory requirement that the employer pay a sum in liquidated damages equal to the unpaid wages so as to compensate the injured employee for the retention of his pay.

"It is realized that this conclusion puts the employer and his employees to an 'all or nothing gamble,' as Judge Chase phrased the result in his dissent below. Theoretically this means each party gets his just desserts, no more, no less. The alternative is to find in the Act an intention of Congress to leave the adjustments to bargaining at the worst between employers and individual employees or at best between employers and the employees' chosen representatives, bargaining agent or some other. We think the purpose of the Act, which we repeat from the O'Neil case was to secure for the lowest

paid segment of the nation's workers a subsistence wage, leads to the conclusion that neither wages nor the damages for withholding them are capable of reduction by compromise of controversies over coverage."

Now, to that there is a very cryptic note, which I do not pretend to understand, part of which read:

"Settlements of controversies under the Act by stipulated judgments in this Court are also referred to by Petitioner. North Shore Corporation vs. Barnett, et al., 323 U. S. 679.

"Petitioner draws the inference that bona fide stipulated judgments on alleged Wage-Hour violations for less than the amount actually due stand in no better position than bona fide settlements."

There is more to the note which I will not read.

The opinion seems to hold that the full sum is due by law to each of the plaintiffs and that there can be no compromise. The Court desires to be advised whether it is believed that the Court is empowered to abstract money from plaintiffs even though they agree thereto in court. Furthermore, since coverage cannot be compromised, the Court doubts its power, in view of this opinion, to enter a judgment which gives to certain plaintiffs less than they alone would be entitled to, because of the inclusion in the settlement of certain other employees who might not be covered at all.

Now, I will set this down for argument or deal with it in any way that the parties may desire.

Mr. Rockwood: Does your Honor wish to have

briefs filed on the question of the legality of the settlement?

The Court: Well, if that is an agreeable method with the attorneys to deal with the question I will be glad to, and if I am not fully advised I will order oral argument.

Mr. Tongue: That will be entirely satisfactory to the plaintiffs, your Honor.

The Court: How much time do you want?

Mr. Rockwood: Well, I assume that my associates will be primarily responsible for the writing of the brief and I would like thirty days.

Mr. Tongue: That is agreeable, your Honor.

The Court: And how much time would you wish?

Mr. Rockwood: Well, I think, since this is not really controversial,—I don't think it is a question of sustaining the burden of the settlement any more than the plaintiffs sustain the burden of the settlement; we are both on the same side, we both want to settle—I think we can file them simultaneously.

Mr. Tongue: Yes.

The Court: Yes, not only that, but the Court would like to have you settle.

Mr. Rockwood: May I request permission to secure from the reporter a transcript of your remarks this morning, your Honor.

The Court: Yes. Thirty days allowed altogether to anyone who wants to file a brief, and if at that time the Court is not fully advised I will order oral argument.

REPORTER'S CERTIFICATE

I, Cloyd D. Rauch, a Court Reporter of the above-entitled Court, duly appointed and qualified, hereby certify that on Monday, the 13th day of May, 1946, I reported in shorthand oral opinion by the Court and accompanying colloquy between the Court and counsel had in the above-entitled cause, that I subsequently caused my said shorthand notes to be reduced to typewriting, and that the foregoing transcript consisting of seven pages, numbered 1 to 7, both inclusive, constitutes a full, true and accurate transcript of said proceedings, so taken by me in shorthand on said date as aforesaid, and of the whole thereof.

Dated this 14th day of May, A.D. 1946.

/s/ CLOYD D. RAUCH,
Court Reporter.

[Endorsed]: Filed May 20, 1946.

In the District Court of the United States
for the District of Oregon

No. Civil 3000

L. I. MACKLIN, et al.,

Plaintiffs,

vs.

KAISER COMPANY, INC.,

Defendant.

James Alger Fee, District Judge.

December 20, 1946

OPINION

The initiation of the present litigation came about through one Clarence Culver, a former resident of Oklahoma. He came to this section, according to his testimony, at the request of the Kaisers who were soliciting help. At first employed at Oregon Shipbuilding Corporation and later as a guard at Swan Island Shipyard on July 24, 1943, he drew 95 cents an hour until October 3, 1943, when he was employed at $1.05 per hour until his release on February 27, 1945. He claims he was required to report at roll call from eight to thirty minutes ahead of midnight when he went on duty and watched until 8:00 a.m. For some unaccountable reason, it was some months after his release while he was in other employment, that he first gave thought to the fact that he had been putting in overtime in connection with the roll call. As a result he wrote to the Wage

and Hour Office at Washington, D. C. The Wage and Hour Office in Portland advised Culver, who is one of the plaintiffs here, regretfully, that they were unable to prosecute for the recovery of overtime and suggested that he take measures to bring suit himself. They did not advise him that there was any doubt as to his right to collect in view of the fact that any liability might ultimately fall upon the United States Government for whom the employees of this bureau were working. Judge Dawkins in an opinion marked with crisp perspicacity says in Love vs. Silas Mason Co., 66 F. Supp. 753, where he discusses the effect of a contract between the United States Government and the employer for the prosecution of the war effort:

> "This contract with the Government was entered into for performance in this state for the producing of munitions needed to prosecute the recent war and any judgment recovered will have to be paid, not by defendant, but by the Government.
>
> "According to the contention of defendant in this case all these employees, who have sued for several hundred thousand dollars, continued to work without complaint under the assumption by all parties that they were not affected by the Fair Labor Standards Act."

This action was begun under these auspices by fifty-guards of the war-time operated shipyards of Kaiser Company Incorporated to recover overtime, penalties and attorney fees under the Fair Labor Standards Act of 1938. The action is founded on the

claim that each of these guards was required to report one half hour before being posted as a watch, for roll call. Whether the intention before filing suit was to dispose of this cause by settlement or otherwise, the parties have now stipulated that the defendant company should pay less than the amount claimed for overtime, make no payment on penalties and pay a sum as attorney fees in full settlement of all liability. The United States Maritime Commission has approved the agreement by a letter in writing.

Thereafter, motion was filed for this court to enter judgment in strict accordance with the stipulation. The court did not enter the judgment. Instead, the taking of testimony was ordered. Evidence indicating the attorney fees demanded were reasonable if the order entered, was then offered. Only upon the insistence of the court was any testimony offered as to the facts. There was no cross-examination since one of the attorneys for defendant frankly stated that if this were a trial on the merits he would have asked questions, but since he did not consider the proceeding of that nature he would not cross-examine. The United States did not intervene, nor was there any appearance in its behalf. The court directed the United States Attorney to appear amicus curiae. The testimony of nine only of the fifty-one plaintiffs tended to show that a roll call was once established at thirty minutes before the time of going on duty. Another witness indicated that this degenerated and eventually guards even reported late without penalty. Due to the suggestion

of the court, there were other plaintiffs in the courtroom and it was stated without objection that their testimony would be the same as the other plaintiffs and this was stated also as to the balance of the fifty-one plaintiffs who neither testified nor were in the courtroom.

After the testimony was finished the court raised the question as to whether Kaiser Company Incorporated was engaged in the production of goods for commerce in building these ships. One of the attorneys stated, without contradiction, that the Kaiser Company Incorporated was so engaged. The court also raised the question as to whether the plaintiffs were so engaged. In reply it was stated that in the case of some guards there was a dispute as to this feature since they had worked in barracks areas, dormitory areas, and cafeteria areas outside the fence, but that the settlement was in gross and covered these employees also.

The court at the outset was inclined to enter judgment on a stipulation between private parties but was of opinion, since there was a public interest, testimony was required. On an independent search conducted in view of the fact that all concerned were acquiescing in the entry of judgment, the court discovered serious obstacles. Therefore, the court raised the question as to whether the inclusion of overtime for employees who worked in positions where they were thus guarding installations which had no relation to the production of goods for commerce, was not a compromise of coverage whereby the overtime worked by employees who might have

been engaged in the production of goods for commerce was balanced off against the time of those who clearly were not so engaged, and a compromise thus effected which did not do justice to the inalienable rights of the former. In view of the factual situation thus existing and in view of the failure to pay anything on account of the liquidated damages provided for by the Act, the court pointed out that it was probably that plaintiffs could not accept a compromise of their respective claims assuming these were valid. The court made this inquiry in the light of the opinion in D. A. Schulte, Inc. vs. Gangi, 90 L. Ed. (Advance Opinion) 873.

Briefs were filed upon the legality of the settlement in the light of these propositions. It was argued by both plaintiffs and defendant that it is permissible for employees to settle where there is a dispute as to the amount of overtime worked as distinguished from coverage. Explaining away a rather fulsome statement above noted indicating some employees had not worked all the time guarding installations used for the production of goods for commerce, defendant now says an investigation has been made which discloses that no employees worked a complete week around that type of installation. Further, it says "it must be recognized that if during a particular week a plaintiff performed any work in commerce or in the production of goods for commerce, then he is entitled to the benefits of the Act for that week, irrespective of whether a part of his work was intrastate in character. Consequently, defendant has determined that there are

no facts with respect to the plaintiffs here involved warranting an assertion that during any work week any of said plaintiffs were not entitled to the benefits of the Act, * * *." Defendant, therefore, offers to include these propositions in a stipulation.

The court is still impressed with the position that even in private litigation the plaintiffs, or others in their situation, would not be permitted simply to enter a compromise judgment upon a stipulation which did not set up facts showing their coverage. This stipulation is devoid of any agreement as to such facts. Although there is loose expression in some opinions, no law requires a court to perform the judicial act of entering judgment simply because the parties have agreed that a certain figure shall be used as the amount of damage or liability. The court has jurisdiction to dismiss the action even though the reasons for so doing may be utterly inadequate.[1] Likewise, the court has jurisdiction to refuse to enter judgment upon a stipulation which does not set out facts. The court might well conclude this case upon the proposition that the plaintiffs have no right to bargain away the benefits conferred by the Act in question. A court can "always refuse to sanction such agreements, when right and justice so require." McLeod v. Hyman, 272 Pennsylvania 582 [116 Atlantic 535, 536].

But the court has made an independent investigation and is of the opinion that judgment cannot be entered on this stipulation in any event. An exam-

[1]Haggard vs. Pelicier Freres [1892] A.C. 61.

ination into the pleadings, the stipulation itself, and the statements made by the respective attorneys in court makes crystal clear the proposition that any judgment entered in this case based on the stipulation would determine questions of fact which are highly controversial and establish as principles of law theories highly debatable. These may be outlined as follows: (a) there is a question as to whether the Kaiser Company Incorporated was engaged in the production of goods for commerce; (b) there is a question of whether these individual men were engaged in the production of goods for commerce either directly or indirectly even when they were guarding the main installations of the shipyard; (c) there is a question whether all of these men were engaged at all times in the production of goods for commerce when they were guarding other installations only indirectly connected with the construction; (d) there is a question of whether plaintiffs should be entitled to compromise their individual claims whether effecting coverage or not; (e) there is a question of whether the Kaiser Company Incorporated, while it was engaged in the production of ships for the war effort under a cost contract plus fees in production of goods for the United States came within the purview of the Fair Labor Standards Act; (f) there is a question of whether the Maritime Commission as an administrative body can adjudicate these rights and agree to pay the same and have a judicial decree entered enforcing their determination; (g) there is a question of whether the United States can be rendered liable by

stipulation, judgment or otherwise for overtime pay under the Fair Labor Standards Act; (h) there is a question of whether the United States can be rendered liable either by stipulation or judgment for a penalty imposed on private employers for failure to obey the mandates of the Fair Labor Standards Act of 1938.

It is clear from a review of the course of the proceedings that facts are here impliedly agreed to by the respective parties which may be contrary to those which a court might find upon a trial where the issues were sharply contended. The defendant is willing to stipulate further facts based on its investigation which a cross-examiner might destroy. There, parties by stipulating for a judgment have assumed certain rules of law. They even impliedly agree to doctrines of constitutional law on which the jurisdiction of the court is founded.

But a court examining such questions may properly, and at times is duty bound to, find the "fact" set up in a stipulation to be untrue.[2] No validity is allowed by courts to an agreement between parties litigant as to the rule of law.[3] Force in geometrical proportion emanates from these propositions where precedent making construction of the Constitution is required, or where the jurisdiction of the court is involved. Consent of the parties can establish

[2]Swift & Co. v. Hocking Valley Ry. Co., 243 U. S. 281, 289.

[3]92 A.L.R. 664, 665; United States v. Johnson, 319 U. S. 302, 304.

neither the one or the other. The question whether either a contractor on a cost contract plus fees with the United States in building ships for the war effort, or his employees, is engaged in producing goods for commerce must be answered affirmatively by the court before it passes judgment. Jurisdiction of the court is inherent in that affirmative finding.

This issue should never be determined by a court in a proceeding which is not adversary. A tenant of residential property owned by defendant brought suit alleging that the property was in a defense rental area for which the Price Administration had promulgated a regulation and that the rent paid by him was in excess of the maximum fixed by the regulation. The court held that the action should be dismissed because the regulation was unconstitutional since Congress had improperly delegated power to the Administration. It appeared that the defendant owner had undertaken to procure an attorney to represent plaintiff and had assured plaintiff that his presence in court would not be necessary. The court said:

> "The Government does not contend that, as a result of this cooperation of the two original parties to the litigation, any false or fictitious state of facts was submitted to the court. But it does insist that the affidavits disclose the absence of a genuine adversary issue between the parties, without which a court may not safely proceed to judgment, especially when it assumes the grave responsibility of passing upon the

constitutional validity of legislative action." United States vs. Johnson, 319 U. S. 302, 304.

Especially must it be noted that this suit is not adversary. When questions such as are posed by this record arise, the courts will be extremely hesitant to dispose thereof when the proceedings are not clearly adversary even if in entire good faith.[4] Indeed, it is expressly said that "such a suit is collusive because it is not in any real sense adversary."[5] This action is frankly and avowedly friendly. It was expressly stated in the record, "we are both on the same side." It may be noted without obloquy that counsel are able to agree on any proposition of fact or law necessary to base the judgment.

As a result of this absence of controversy, the stipulation of settlement renders the case moot.[6] The court is not then bound to enter judgment to enforce the stipulation of settlement made by the parties.[6a] It is hornbook law that whenever a case in a federal court is settled by agreement, no "case

[4]Coffman v. Breeze Corporations, 323 U. S. 316, 324-5; Congress of Industrial Organizations v. McAdory, 325 U. S. 472, 475.

[5]United States v. Johnson, 319 U. S. 302, 304.

[6]Paradise Land & Livestock Co. v. Federal Land Bank of Berkeley, 10 Cir., 147 F.2d 594; Buck's Stove & Range Co. v. American Federation of Labor, 219 U. S. 581; Dakota County v. Glidden, 113 U. S. 222, 223-4.

[6a]Hartford v. Bridgeport Trust Co., 143 F. 558.

or controversy"[7] remains and therefore the court loses jurisdiction.[8] A court of the United States by this constitutional limitation lacks power to render opinions merely advisory,[9] or to decide moot questions,[10] or to set precedents for future litigation.[11] When, by action of the parties, a case becomes moribund neither their desire nor their express consent can retain life in the controversy.[12]

But it is intimated in the record that the Attorney General has consented to the entry of judgment. In a case where the Government had confessed error in the trial of a criminal case, the court refused to be bound thereby saying:

> "The public interest that a result be reached which promotes a well-ordered society is foremost in every criminal proceeding. That interest is entrusted to our consideration and protection as well as to that of the enforcing

[7]U. S. Constitution, Art. III.

[8]St. Pierre v. United States, 319 U. S. 41, 42.

[9]United States and Interstate Commerce Commission v. Alaska Steamship Company, et al., 253 U. S. 113, 115.

[10]United States of America v. Hamburg-Amerikanische Packetfahrt-Actien Gesellschaft, 239 U. S. 466, 475-77.

[11]California v. San Pablo and Tulare R.R. Co., 149 U. S. 308, 313-14 and cases cited.

[12]Southern Pacific Co. v. Eshelmann, 227 F. 928.

> officers. Furthermore, our judgments are precedents, and the proper administration of the criminal law cannot be left merely to the stipulation of parties."[12a]

Here there is a public interest in the outcome of this case. If the court grant judgment it may be taken as sufficient basis for payment of money of the United States. Likewise, similar cases would follow the lines laid down herein. The entry of judgment would constitute a precedent for like action in numerous similar installations throughout the country.

But the Attorney General did not consent to this judgment since the United States Attorney expressly reserved upon the record the right to question the recovery of defendant from the Government. The question is, if judgment enter would protest avail in a proceeding by Kaiser Company against the United States where this claim had been paid with judicial sanction.

Then it is said that the Martime Commission has reviewed the facts and has approved the stipulation and the entry of judgment for specified amounts against the defendant, and, of course, with the full knowledge that the fact of the judgment against defendant will be enforced as an obligation of the United States.

In a case where there was a stipulation purporting to reveal the administrative practice in applying the gift tax law, the Supreme Court refused to

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[12a] Young v. United States, 315 U. S. 257, 259.

follow or apply the practice as guiding or controlling judicial decision saying:

> "Such a stipulated definition of the practice is too vague and indefinite to afford a proper basis for a judicial decision which undertakes to state the construction of the statute in terms of the practice. Moreover, if we regard the stipulation as agreeing merely that the legal questions involved in the present case have uniformly been settled administratively in favor of the contention now made by the petitioner, it involves conclusions of law of the stipulators, both with respect to the legal issues in the present case and those resolved by the practice. We are not bound to accept, as controlling, stipulations as to questions of law." Estate of Sanford v. Commissioner of Internal Revenue, 308 U. S. 39, 50-51.

If then, it can be contended that the Maritime Commission's approval of the stipulation tends to establish the appropriate administrative practice with reference to the facts, this court finds that the practice does not mark the channel of decision, and if the Commission attempts to point out the applicable law, this court is not bound thereby.

If it were established that the Maritime Commission had made an administrative determination of the validity of this claim, then this court would have no power to review it directly nor to add to their determination the weight of judicial sanction, because no act of Congress bestows such jurisdiction upon this court. Even if we had such jurisdiction

the basis of the administrative determination would have been examined anew in a case where there were actual adverse parties.[13] It is no part of the duty of the court in this proceeding to relieve the Commission of the responsibility of determining whether these are claims properly payable by the United States. Even if the sole purpose was to enter this judgment in a convenient form for use in negotiations between the Kaiser Company and the Maritime Commission, it would be improper. The Supreme Court of Virginia has held that an action for damages will not lie against a state institution against which a judgment can not be enforced simply to fix damages in order to present a claim to the legislature. Maia v. Eastern State Hospital (1899), 97 Virginia 507.

The case of Swift & Company v. United States, 276 U. S. 311, shows clearly that the lower courts have the responsibility to refuse to enter a judgment where there is an attempt to base jurisdiction upon consent. The rule that a consent decree for an injunction in favor of the Government may be permissible should never be extended to imply liability of the United States for payment of money in a cause between third parties.

If the United States Maritime Commission is convinced of the justice of this claim, they may act on their own responsibility and without the adventitious aid of a judgment. There will then be no ap-

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[13]Old Colony Trust Company v. Commissioner of Internal Revenue, 279 U. S. 716, 723, 724.

parent determination of issues of fact and law which have no basis in an actual case or controversy.

However, the court makes it plain that there are no intimations made as to the conduct of any party, attorney, agent or official of the Government in this case. But the court must not act unless it is given power, and should not act when vital interests of others might be affected.

Finally then, if all other reasons were laid aside, this is the one insuperable obstacle to the entry of this judgment. A judgment against defendant is a judgment against the United States. As Judge Dawkins says in the case above cited:

> "The attempt to assert these claims in another state, because it has a longer period of limitations, certainly would work a decided prejudice, to the real defendant, the Government, if the plaintiffs, who brought their actions here, were permitted to dismiss them for the sole purpose of avoiding the effects of the delay in filing them."

Even in private litigation the Supreme Court of the United States has set up adamantine barriers against the settlement of the rights of third parties by agreement between two parties to the litigation.[14] This principle is especially applicable where the interests of the United States Government might be prejudiced because its agents are myriad

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[14]See also Meeker v. Straat, 38 Missouri Appeal Reports 239, 243; Ward v. Alsup, 100 Tennessee 619.

and its interests are far flung and well nigh universal. It has been said:

> "The objection in the case before us is, not that the proceedings were amicable, but that there is no real conflict of interest between them; that the plaintiff and defendant have the same interest, and that interest adverse and in conflict with the interest of third persons, whose rights would be seriously affected if the question of law was decided in the manner that both of the parties to this suit desire it to be"[15]

The conclusion arrived at in that case may serve here. If the court acceded to the wishes of the parties, it might be said:

> "A judgment entered under such circumstances, and for such purposes, is a mere form. * * * A judgment in form, thus procured, in the eye of the law is no judgment of the court. It is a nullity, and no writ of error will lie upon it."

Unless other matter is shown, the cause will be dismissed.

[Endorsed]: Filed Dec. 23, 1946.

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[15]Lord v. Veazie, 8 Howard 251, 255, 256.

[Title of District Court and Cause.]

Friday, December 20, 1946

Before: Honorable James Alger Fee,
Judge.

Appearances:

MOWRY & MOWRY, and

THOMAS H. TONGUE, III,
Of Attorneys for Plaintiffs.

FLETCHER ROCKWOOD,
Of Attorneys for Defendant.

EXCERPTS FOLLOWING DELIVERY OF OPINION ORALLY BY THE COURT

Mr. Rockwood: If your Honor please, may we have copies of that opinion from the reporter?

The Court: Yes. There are some minor corrections to be made, but as soon as that is done, I think during the course of the day, you can have it.

Mr. George Mowry: If your Honor please, may we have a few days to consider that opinion?

The Court: Oh, yes, certainly.

Mr. George Mowry: Will your Honor fix a time, or may we have a reasonable time?

The Court: Oh, I can't fix a date.

Mr. Rockwood: It was with some difficulty that I followed the very carefully considered statements of your Honor. There were two statements, I think, which were not squarely in accordance with the

facts and you might wish to correct your opinion before it is made public.

The Court: I should be glad to have it pointed out.

Mr. Rockwood: I just point this out, that you referred to the contract under which Kaiser Company was building ships as a cost-plus contract. That is not quite correct. It is a cost contract plus fees determined on a certain basis, which may or may not be directly related to costs.

And, furthermore, your Honor referred to profit to the defendant in the event of payment by the defendant of this judgment. I assume that your Honor believed that the amount of the compensation to Kaiser Company, resting in part on the cost of operating the shipyards, would be increased if this judgment were paid. That is not correct. The defendant will derive no profit or no increased compensation from the Maritime Commission as a result of the payment of this judgment if it were entered in accordance with the stipulation and were paid.

The Court: I am glad you called this to my attention. Of course, I did not have the contract before me, but was acting a little in the dark, but that is not my fault, if I may say so.

Mr. Tongue: Your Honor, I understand that your Honor is leaving town tonight and will be away for some time.

The Court: No, I am leaving tomorrow night.

Mr. Tongue: Well, whatever it may be, your Honor, I just wondered on this point, should the

parties decide that there is nothing further to present to the Court and that the case may be dismissed, will it be necessary to wait until your Honor returns, or what——

The Court: No, if you come to that determination the Court will sign a judgment any time you send it.

Mr. Rockwood: Your Honor understands that I have associated with me in this case San Francisco attorneys, particularly Mr. Gordon Johnson, and at the very earliest moment I will want to send him a copy of this opinion and probably discuss it with him, either by telephone or otherwise, and because of that circumstance I would hope that your Honor would defer the entry of any further order, maybe for as long as ten days, so we can have a chance to——

The Court: No, you won't be hampered at all in that regard. If you do not come to a place where both sides tell me that they are satisfied, I would require further hearing.

Mr. Rockwood: Thank you.

Mr. George Mowry: If your Honor please, it so happens that we directly represent these guards and I have been in constant touch with them, all fifty-two, and I would like to lay any foundation here that it is possible and necessary to make to preserve our right to try this case out. If your Honor adheres to this opinion in rejecting the stipulation, I would like to go on record that we want to try the case, and of course——

The Court: Well, the situation is that if the

case is left open and if there any further proceedings desired by either party, why, you may——

Mr. Mowry: Yes, your Honor, thank you very much.

The Court: ——take such action.

REPORTER'S CERTIFICATE

I, Cloyd D. Rauch, one of the Court Reporters of the above-entitled Court, duly appointed and qualified, do hereby certify that on Friday, the 20th day of December, A.D. 1946, I reported in shorthand certain proceedings had in the above-entitled cause, that I subsequently caused to be transcribed into typewriting certain excerpts from said proceedings, and that the foregoing transcript, pages 1 to 4, both inclusive, constitutes a full, true and accurate transcript of said excerpts, so taken by me in shorthand on said date as aforesaid, and of the whole thereof.

Dated this 21st day of December, A.D. 1946.

/s/ CLOYD D. RAUCH,
Court Reporter.

[Endorsed]: Filed Dec. 26, 1946.

[Title of District Court and Cause.]

AMENDED ANSWER TO COMPLAINT AND SUPPLEMENTAL COMPLAINT

Defendant, Kaiser Company, Inc., based upon stipulation and order of court, files its amended answer to plaintiffs' complaint and supplemental complaint herein and admits, denies, and alleges:

I.

Answering paragraph I of plaintiffs' complaint, denies each and every, all and singular, generally and specifically, the allegations contained in said paragraph.

II.

Answering paragraph II of plaintiffs' complaint, defendant admits the following: It is, and at all times mentioned in said complaint was, a corporation organized and existing under the laws of the State of Nevada; during the period of time referred to in said complaint it was engaged in the construction and operation of a shipyard for the United States Maritime Commission, an agency of the United States of America, at Swan Island, in the City of Portland, State of Oregon, where it maintained an office in connection with such activities; said shipyard was located on property held under lease by the United States Maritime Commission and all of the facilities, materials, supplies and other properties used in connection with the construction, maintenance and operation of said shipyard were the property of the United States, and

all vessels constructed at said shipyard were tankers constructed for and delivered to the United States within the State of Oregon; from approximately the 15th day of February, 1945, to the end of the period of time referred to in said complaint, to wit, October 25, 1945, defendant repaired certain vessels at said shipyard, all of such work being done under contract with the United States and its agencies and, so far as known to defendant, all of said vessels so repaired belonging to the United States; title to all materials, equipment, supplies and other property going into the construction of said vessels was at all times in the United States of America from the date of purchase and commencement of movement to said shipyard, approximately ninety per cent (90%) by value thereof being furnished to defendant by the United States of America; a substantial part of the materials, equipment, supplies and other property going into the construction of said vessels, both of that portion furnished by the Government and of that portion procured by defendant, was manufactured or produced outside the State of Oregon and shipped to said shipyard on Government bills of lading, title thereto being in the Government, as aforesaid; the tankers constructed by defendant at said shipyard were contracted for by the United States of America and used in the prosecution of the war in which it was then engaged, and the vessels repaired at said shipyard were under the ownership or control of the United States of America in connection with the prosecution of said war and in connection with

other Governmental purposes and uses; but the funds for the operation of said shipyard were those of defendant, being procured from its capital funds or from borrowings, but expenditures were reimbursed or allowed in cost under the terms of defendant's contracts with the Government; defendant furnished the organization, supervision, "know-how," and production methods for the conduct of said shipyard; but the construction, maintenance and operation of said shipyard by defendant were at all times under the direction, supervision and control of the United States of America, acting by and through the United States Maritime Commission. Except as herein expressly admitted, defendant denies each and every, all and singular, generally and specifically, the allegations contained in said paragraph.

III.

Answering paragraph III of plaintiffs' complaint, defendant admits the following: In the period of time referred to in said paragraph, and in connection with the construction, maintenance and operation of said shipyard as hereinabove in paragraph II expressly alleged, defendant engaged various persons as guards at said shipyard for the purpose of protecting property of the United States Government, the engagement of said persons by defendant being at all times subject to the direction, supervision and control of said Government, acting by and through the United States Maritime Commission, and said engagement by defendant being

for the use and benefit of the United States Government. Except as herein expressly admitted, defendant denies each and every, all and singular, generally and specifically, the allegations contained in said paragraph.

IV.

Answering paragraph IV of plaintiff's complaint, defendant admits the following: At various times during the operation of said shipyard, as stated in paragraph II hereof, in the period of time referred to in the complaint, plaintiffs were engaged as guards at said shipyard, as alleged in paragraph III hereof. Except as herein expressly admitted, defendant denies each and every, all and singular, generally and specifically, the allegations contained in said paragraph.

V.

Answering paragraph V to and including paragraph XXXVII of the complaint and paragraph I and paragraphs III to and including paragraph XX of the supplemental complaint herein, defendant admits the following: That the persons named in said paragraphs have employed attorneys to prosecute their respective claims referred to in the complaint and the supplemental complaint; and further admits that, subject to the admissions contained in its answer to paragraphs II, III and IV of the complaint, the persons named in the above-mentioned paragraphs of the complaint and the supplemental complaint were engaged as guards at the shipyard referred to in the complaint and supplemental complaint. Except as herein expressly

admitted, defendant denies each and every, all and singular, generally and specifically, the allegations contained in said paragraphs and each thereof.

VI.

Answering paragraph II of the supplemental complaint, in so far as said paragraph adopts paragraphs II, III and IV of the original complaint, defendant realleges the matters set forth in paragraphs II, III and IV above of this amended answer. Except as herein expressly admitted, defendant denies each and every, all and singular, and generally and specifically, the allegations contained in said paragraph II of the supplemental complaint.

As and for a first, further, separate and distinct answer and defense to the complaint and supplemental complaint herein, defendant alleges:

I.

The rights of action set forth in the complaint and supplemental complaint are for trifling periods of time and sums due and are within the doctrine expressed in the legal maxim "de minimis non curat lex."

As and for a second, further, separate and distinct answer and defense to the complaint and supplemental complaint herein, defendant alleges:

I.

Defendant is, and at all times mentioned in said complaint and supplemental complaint was, a cor-

poration organized and existing under the laws of the State of Nevada; during the period of time referred to in said complaint it was engaged in the construction and operation of a shipyard for the United States Maritime Commission, an agency of the United States of America, at Swan Island, in the City of Portland, State of Oregon, where it maintained an office in connection with such activities; said shipyard was located on property held under lease by the United States Maritime Commission and all of the facilities, materials, supplies, and other properties used in connection with the construction, maintenance and operation of said shipyard were the property of the United States, and all vessels constructed at said shipyard were constructed for and delivered to the United States within the State of Oregon; from approximately the 15th day of February, 1945, to the end of the period of time referred to in said complaint and supplemental complaint, to wit, October 25, 1945, defendant repaired certain vessels at said shipyard, all of such work being done under contract with the United States and its agencies and, so far as known to defendant, all of said vessels so repaired belonging to the United States; title to all materials, equipment, supplies and other property going into the construction of said vessels was at all times in the United States of America from the date of purchase and commencement of movement to said shipyard, approximately ninety per cent (90%) by value thereof being furnished to defendant by the

United States of America; a substantial part of the materials, equipment, supplies and other property going into the construction of said vessels, both of that portion furnished by the Government and of that portion procured by defendant, was manufactured or produced outside the State of Oregon and shipped to said shipyard on Government bills of lading, title thereto being in the Government, as aforesaid; the tankers constructed by defendant at said shipyard were contracted for by the United States of America and used in the prosecution of the war in which it was then engaged, and the vessels repaired at said shipyard were under the ownership or control of the United States of America in connection with the prosecution of said war and in connection with other Governmental purposes and uses; but the funds for the operation of said shipyard were those of defendant, being procured from its capital funds or from borrowings, but expenditures were reimbursed or allowed in cost under the terms of defendant's contracts with the Government; defendant furnished the organization, supervision, "know-how," and production methods for the conduct of said shipyard.

II.

By reason of the foregoing, the United States is the real party in interest and the true defendant in the above-entitled action and, by reason of not having consented to be sued in an action of the character and involving the amount set forth in the complaint and supplemental complaint herein, enjoys sovereign immunity from suit on the causes

of action referred to in said complaint and supplemental complaint.

As and for a third, further, separate and distinct answer and defense to the complaint and supplemental complaint herein, defendant alleges:

I.

Defendant adopts and incorporates herein by reference the allegations set forth in paragraph I of its second affirmative defense.

II.

By reason of the foregoing the United States of America is in fact and in law the employer of plaintiffs named in the complaint and supplemental complaint insofar as the activities referred to in said complaint and supplemental complaint are concerned; and inasmuch as the United States of America is excluded from the term "employer" as used in the Fair Labor Standards Act of 1938, plaintiffs are not entitled to the benefits of said Act and said Act is not applicable to them in connection with the matters referred to in the complaint and supplemental complaint.

As and for a fourth, further, separate and distinct answer and defense to the complaint and supplemental complaint herein defendant alleges:

I.

Defendant adopts and incorporates herein by reference the allegations set forth in paragraph I of its second affirmative defense.

II.

The foregoing activities of defendant were carried on under cost-plus-a-fixed-fee management contracts or price-minus contracts with the United States Maritime Commission, all of which contracts were management contracts under which the principal function of defendant was to furnish managerial "know-how" for the construction, maintenance and operation of a shipyard belonging to the United States of America and under which the defendant was at all times subject to the direction, supervision and control of the United States of America in carrying on its sovereign function of prosecuting a war and procuring the necessary equipment, supplies and material necessary for such war prosecution.

III.

Such activities of the United States Government, and of defendant on its behalf and subject to its direction, supervision and control, do not constitute commerce within the meaning of the Fair Labor Standards Act of 1938.

As and for a fifth, further, separate and distinct answer and defense to the complaint and supplemental complaint herein, defendant alleges:

I.

Defendant adopts and incorporates herein by reference the allegations set forth in paragraph I of its second affirmative defense and paragraph II of its fourth affirmative defense.

II.

The activities of defendant, as aforesaid, were as an instrumentality of the United States of America and by reason thereof, as such instrumentality, defendant enjoys, in connection with the matters referred to in the complaint and supplemental complaint herein, sovereign immunity from suit on such matters.

As and for a sixth, further, separate and distinct answer and defense to the complaint and supplemental complaint herein, defendant alleges:

I.

The claims and causes of action referred to in the complaint and supplemental complaint herein arose prior to May 14, 1947, the date of the enactment of the Portal-to-Portal Act of 1947.

II.

The activities of plaintiffs were and are not activities which were compensable by either:

(a) An express provision of a written or non-written contract of employment in effect at the time of such activities, between plaintiffs (or their agent or collective bargaining representative) and defendant; or

(b) A custom or practice in effect, at the time of such activities, at the establishment and place of employment of plaintiffs, to wit, at Swan Island shipyard, covering such activities.

III.

By reason of the foregoing, under Section 2(a) of the Portal-to-Portal Act of 1947, defendant is not subject to any liability under the Fair Labor Standards Act of 1938, as amended, in connection with the matters referred to in the complaint and supplemenal complaint herein.

As and for a seventh, further, separate and distinct answer and defense to the complaint and supplemental complaint herein, defendant alleges:

I.

Defendant adopts and incorporates herein by reference the allegations set forth in paragraphs I and II of its sixth affirmative defense.

II.

By reason of the foregoing, under Section 2(d) of the Portal-to-Portal Act of 1947, this court is without jurisdiction of this action and is without jurisdiction of each and every claim and cause of action referred to in the complaint and supplemental complaint herein.

As and for an eighth, further, separate and distinct answer and defense to the complaint and supplemental complaint herein, defendant alleges:

I.

The matters and claims referred to in the complaint and supplemental complaint herein relate to and are based on acts or omissions of defendant

prior to May 14, 1947, the date of the enactment of the Portal-to-Portal Act of 1947, and relate to the failure of the defendant, as the alleged employer of plaintiffs, to pay overtime compensation under the Fair Labor Standards Act of 1938, as amended.

II.

The acts or omissions of defendant complained of in said complaint and supplemental complaint herein were in good faith, in conformity with, and in reliance on administrative regulations, orders, rulings, approvals, and interpretations of the United States Maritime Commission, an agency of the United States, and in conformity with and in reliance on administrative practices and enforcement policies of such agency, with respect to the class of employers to which defendant belonged.

III.

By reason of the foregoing, pursuant to Section 9 of the Portal-to-Portal Act of 1947, defendant may not be subjected to any liability for or on account of the matters referred to in the complaint and supplemental complaint herein.

As and for a ninth, further, separate and distinct answer and defense to the complaint and supplemental complaint herein, defendant alleges:

I.

The acts or omissions of defendant referred to in the complaint and supplemental complaint herein and giving rise to the above-entitled action and the

causes of action set forth in the supplemental complaint, were performed, committed, or omitted by defendant in good faith and with reasonable grounds for belief that such acts or omissions were not a violation of the Fair Labor Standards Act of 1938, as amended.

II.

By reason of the foregoing, pursuant to Section 11 of the Portal-to-Portal Act of 1947, this court, in its sound discretion, should award no liquidated damages to plaintiffs referred to in the complaint or supplemental complaint.

Wherefore, defendant prays that plaintiffs named herein and in the supplemental complaint take nothing, and that defendant may be hence dismissed with its costs.

/s/ RICHARD DEVERS,
HART, SPENCER, McCULLOCH & ROCKWOOD,
Attorneys for Defendant.

Service acknowledged.

[Endorsed]: Filed Sept 22, 1947.

[Title of District Court and Cause.]

ORDER SETTING CASE FOR PRE-TRIAL CONFERENCE

Plaintiff appearing by Mr. Edwin D. Hicks, of counsel, and the defendant by Mr. Richard Devers, of counsel.

It Is Ordered that this cause be and it is hereby set for pre-trial conference for Monday, November 17, 1947.

[Title of District Court and Cause.]

MOTION FOR ENTRY OF STIPULATED JUDGMENT OR, IN THE ALTERNATIVE, FOR ENTRY OF SUMMARY JUDGMENT OR FOR LEAVE TO FILE SUPPLEMENTAL COMPLAINT

Come now the plaintiffs and move the Court as follows:

1. For the entry of judgment in the form heretofore submitted and filed herein by the parties hereto, together with their stipulation that said judgment be entered herein, pursuant to Rule 68 of the Federal Rules of Civil Procedure; or, in the alternative, and in said motion be denied,

2. For the entry of a summary judgment in favor of plaintiffs for the relief demanded in the affidavit attached hereto, marked Exhibit A, pursuant to Rule 56 of the Federal Rules of Civil

Procedure, upon the ground that the parties hereto have compromised and settled the issues involved in this case; that said compromise and settlement was of a bona fide dispute as to the amounts payable by defendant, as employer, to plaintiffs, as its employees, pursuant to a cause of action or an action to enforce a cause of action arising under the Fair Labor Standards Act of 1938, 28 U.S.C.A. sec. 201 ff; and that said compromise or settlement was authorized by and under said Act and was also thereafter authorized, approved and ratified by and under section 3 (a) and (d) of the Portal-to-Portal Act of 1947, 28 U.S.C.A. sec. 253 (a) and (d); or, in the alternative, and if said motion be denied, then

3. For leave to file the proposed supplemental complaint attached hereto, pursuant to Rule 15 (d) of the Federal Rules of Civil Procedure.

HICKS, DAVIS & TONGUE,

/s/ THOMAS H. TONGUE, III,
Of Attorneys for Plaintiffs.

Service excepted.

[Endorsed]: Filed Dec. 19, 1949.

[Title of District Court and Cause.]

AFFIDAVIT

State of Oregon,
County of Multnomah—ss.

I, Thomas H. Tongue, III, being first duly sworn, on oath, depose and say:

1. That since the filing of the complaint herein on December 7, 1945, I have been one of the attorneys for plaintiffs.

2. That shortly after the filing of said complaint negotiations for settlement of the case were entered into by and between attorneys for plaintiffs and attorneys for defendant.

3. That as a result thereof a compromise and settlement was agreed upon according to the terms of the stipulations and proposed form of judgment filed herein; that in the course hereof attorneys for defendant submitted to attorneys for plaintiff a proposed form of judgment to be entered herein, together with a proposed form of stipulation for the entry of said judgment; that said proposed form of judgment was accepted and approved by attorneys for plaintiffs and said stipulation for the entry thereof was signed by attorneys for both parties.

4. That the terms of said settlement were duly approved on behalf of the United States by both the United States Maritime Commission and the United States Attorney.

5. That on April 19, 1946, said stipulation and proposed form of judgment were duly filed herein and attorneys for both parties requested that said judgment be entered, but that Court directed that a further hearing be held for the taking of testimony before deciding whether to approve and enter said judgment and that on April 22, 1946, such a further hearing was held.

6. That at said hearings it appeared from the testimony of several of the plaintiffs, from the testimony of other witnesses, and from statements of counsel for both parties that there was no dispute as to any question of law and that it was admitted by defendant that it was subject to and that plaintiffs were covered by the Fair Labor Standards Act of 1938, but that a dispute existed as to the number of overtime hours worked by plaintiffs each week; that a transcript of the testimony at said hearings is available and will be furnished to the Court if requested.

7. That on May 13, 1946, the Court, in an oral statement, indicated that the transaction was fair and regular and an appropriate settlement which the Court would approve without question were it not for the problem whether, in view of the decision in D. A. Schulte v. Gangi, 90 L. Ed. 873, the Court had power to approve the settlement, and it was agreed that the parties might submit briefs upon that question.

8. That on June 27, 1946, plaintiff filed its memorandum in support of said settlement and of

said proposed judgment and stipulation and on July .., 1946, defendant filed its memorandum in support thereof and in said memorandum made the following statements:

(a) "The testimony given at the hearing was typical of that which is to be expected in any litigation. The plaintiffs who testified stated that they were required to report one-half hour early every day during their employment for the purpose of roll call, inspection and other preliminary duties; although one of these witnesses conceded that for a time at least the periods required for the roll call and inspection might have been less than one-half hour.

"The testimony of defendant's representative, Mr. W. L. Tuson, contradicted the assertion of plaintiffs that they reported one-half hour early during every day of their employment. Mr. Tuson stated that originally the guards had been instructed to report one-half hour early, but that in actual practice this rule was not enforced, that the time was gradually cut down, and that in fact many guards reported simply at the beginning of the shift, or even reported late for work. He indicated that the time required for the roll call was a varying figure, running from five minutes to thirty minutes. Furthermore, Mr. Tuson testified that there were no existing records from which an exact determination of the time spent by the

plaintiffs for roll call and inspection could be made at the present time."

(b) "We submit that upon analysis the statements do not present an issue with respect to coverage. It was conceded that the Company itself was engaged in commerce or the production of goods for commerce so that its operations fell within the coverage of the Fair Labor Standards Act. The particular situation to which Mr. Rockwood referred was the question as to whether the fact that a guard, in the course of rotation from post to post, worked one day inside the shipyard fence (concedely engaged in the production of goods for commerce) and another day worked outside the fence (possibly not engaged in the production of goods for commerce) destroyed the guard's rights under the Act during the time spent outside the shipyard proper.

"Since the proceedings of May 13, 1946, an investigation has been made in an effort to determine whether any of the plaintiffs in the present action spent a full work week in beyond the fence activities, and no such case has been discovered. It must be recognized that if during a particular week a plaintiff performed any work in commerce or in the production of goods for commerce, then he is entitled to the benefits of the Act for that week, irrespective of whether a part of his work was intrastate in character. Consequently, defendant has determined that there are no facts with respect to the plaintiffs

here involved warranting an assertion that during any work week any of said plaintiffs were not entitled to the benefits of the Act, and defendant therefore waives any such point which may have been raised by the remarks of its counsel which were referred to by the Court.

"The ultimate fact is that the real dispute in this case relates to the amount of time which the plaintiffs were required to spend in reporting for roll call and inspection. That is a factual question on which the parties have agreed by this stipulation.

"If the Court deems it necessary that the record be clarified, defendant respectfully suggests that the parties be permitted to amend Paragraph 4 of their stipulation by confining their statement of the controversy to what is basically the issue of the case, namely, the hours worked by the plaintiffs."

A copy of said memorandum is attached hereto marked Exhibit 1 and by the reference made a part hereof.

9. That on December 20, 1946, this Court issued a written opinion disapproving said proposed judgment and stipulation for reasons stated therein.

10. That on January 31, 1947, plaintiffs filed certain interrogatories herein; that on February .., 1947, and March 18, 1947, defendant secured orders extending their time to answer or object to said interrogatories; that on April 8, 1947, defendant filed objections thereto and on May .., 1947, said

interrogatories were withdrawn under order of the Court.

11. That during this time the Portal-to-Portal Act was pending in Congress and the parties hereto were awaiting its provisions as they might apply to this case; that on May 14, 1947, said Act was duly adopted, and that during the weeks immediately following both of the parties hereto attempted to secure authorization from the U. S. Maritime Commission to authorize defendant to make payments to plaintiffs in accordance with the aforesaid stipulation and proposed judgment, but without success.

12. On September 12, 1947, defendant secured an order extending its time to file an amended answer herein and on September 22, 1947, filed such an amended answer.

13. That on November 18, 1947, the case was set for pre-trial conference; that a transcript of said proceedings is unavailable due to the death of the court reporter at that time and the fact that his stenographic notes now appear to be illegible for the most part, but that it is the recollection of affiant, as indicated in a letter written the next day that

> "* * * all of the other wage-hour cases were assigned to Judge McColloch, and Judge Fee was unable to take up these cases, due to other pre-trial conferences yesterday and due to jury trials in his court for the balance of the week. Accordingly, the case has been postponed in-

definitely for the resetting of a pre-trial conference at a later date."

14. That no call date, pre-trial date or otherwise has been set by the Court for this case from November 18, 1947, until December 5 and 12, 1949, at which time it was indicated by the Court that said case might be dismissed for lack of prosecution.

15. That immediately following November 18, 1947, the case of Potter v. Kaiser Company, Inc., Civil No. 3030, was tried before Judge McColloch; that except for the question of compromise and settlement, and except as changed or modified by the testimony and admissions referred to hereinabove in Paragraphs 6 and 8, the facts of that case are identical with the facts of this case on the questions of coverage under the provisions of the Fair Labor Standards Act and upon all of the questions raised by this Court in its opinion of December 20, 1946, namely:

> "(a) there is a question as to whether the Kaiser Company, Incorporated, was engaged in the production of goods for commerce; (b) there is a question of whether these individual men were engaged in the production of goods for commerce either directly or indirectly even when they were guarding the main installations of the shipyard; (c) there is a question whether all of these men were engaged at all times in the production of goods for commerce when they were guarding other installations only indirectly *connection* with the construction; (d)

there is a question of whether plaintiffs should be entitled to compromise their individual claims whether effecting coverage or not; (e) there is a question of whether the Kaiser Company, Incorporated, while it was engaged in the production of ships for the war effort under a cost contract plus fees in production of goods for the United States came within the purview of the Fair Labor Standards Act; (f) there is a question of whether the Maritime Commission as an administrative body can adjudicate these rights and agree to pay the same and have a judicial decree entered enforcing their determination; (g) there is a question of whether the United States can be rendered liable by stipulation, judgment or otherwise for overtime pay under the Fair Labor Standards Act; (h) there is a question of whether the United States can be rendered liable either by stipulation or judgment for a penalty imposed on private employers for failure to obey the mandates of the Fair Labor Standards Act of 1938."

16. That a transcript of the testimony in the Potter case, supra, is attached hereto, marked Exhibit 2, and by this reference made a part hereof. That the exhibits in said case are now in custody of the Clerk of this court in said case. That it is the understanding of affiant that the parties to the Potter case will stipulate that the court may release said exhibits; that defendant herein will stipulate that said transcript and exhibits may be made a

part of the record in this case and that it can be stipulated that, with the exceptions noted above, the facts of this case on the above questions, insofar as they involve questions of fact, are the same as appears from said testimony and exhibits in the Potter case, supra.

17. That in view of the common questions involved, both of the parties hereto desired to and did refrain from taking any affirmative action in this case pending the trial and appeal of the Potter case, supra, which was not decided by the Circuit Court of Appeals until January 10, 1949.

18. That for several months thereafter counsel for plaintiffs were both extremely busy with other litigation of considerable importance and also undecided as to what course of action to take in this case in view of the fact that this Court had declined to approve the aforesaid settlement and the Circuit Court of Appeals in the Potter case appeared to have foreclosed recovery on the merits of the original cause of action, but that said counsel at all times took the position that said settlement was legal and binding.

19. That affiant and other counsel for plaintiffs also relied upon their understanding of the practice of this court to the following effect: that the Court periodically and on its own motion sets cases upon the call calendar and does not allow cases to become stale before setting them for call, as the experience of these and other counsel has shown and as they

have come to rely; that it is ordinarily for the Court to set cases for pre-trial and trial; that once a case is at issue the Court will normally of its own motion set it for call at its early convenience for the purpose of setting a date for pre-trial and trial at its convenience and that of the parties; and that, accordingly, it is unnecessary, if not improper in the ordinary case and in the absence of emergency for counsel to presume to attempt on their own motion to have a case set for pre-trial and trial until it has been set for a call date.

20. That, in addition thereto, it has been common knowledge that Judge James Alger Fee, before whom this case was and is now pending, has been required to be absent from this Court for considerable periods of time during the past two years and, in particular, since the decision in the Potter case, supra, in January 10, 1949, because of his assignment for the trial of cases in other states and for service upon the Circuit Court of Appeals and other necessary duties, and that these duties required his absence for extended periods during the months of January, February, March, May, June, August, September, October and November of 1949; that he found it necessary to absent for a period of approximately 10 weeks immediately prior to November 14, 1949, and that it was within a month of his return that this case was placed on the call calendar.

21. That it is also the understanding of affiant and of other counsel for plaintiff, based on past experience, that once a case has been assigned to

one judge it is improper, in the absence of emergency, to ask any other judge to consider any matter involving the case; that if such is done the other judge will ordinarily postpone the matter until the original judge can consider it or, if out of the city, until he returns; and that for this reason affiant did not consider it either necessary or proper to take up this case with any other judge.

22. That affiant recognizes that there were probably numerous occasions when he could have taken up this case with this Court, but for the above stated reasons did not consider that it was necessary to do so and, at least, considered that it was neither improper nor evidence of a lack of proper diligence to wait until the case was next placed by the Court upon its call calendar.

23. At no time did plaintiffs or affiant or other counsel for plaintiffs intend to discontinue the prosecution of this case, or, in particular, to waive, abandon or relinquish their position that the compromise and settlement previously arrived at, as stated in the stipulation and proposed judgment filed herein, was valid and binding on both parties, despite the disapproval of this Court.

24. Accordingly, and in the interests of their clients, the plaintiffs herein, affiant and other counsel for plaintiffs, respectfully request the Court for an opportunity to demonstrate why, as a matter of law and under the agreed facts of this case, as stated above, plaintiffs are now entitled to the entry of judgment in the form of the proposed judgment

heretofore filed herein and in accordance with the stipulation of the parties filed herein, particularly because of the provisions of the Portal-to-Portal Act referred to in the foregoing motion and which were not in effect at the time of the disapproval of the proposed judgment by this Court.

25. Therefore, it is respectfully submitted that this is a proper case for consideration on the foregoing motion for entry of Judgment for the reason that it was originally stipulated that judgment be entered and that there is no bona fide controversy over any material fact but solely as to questions of law arising from the admitted and agreed facts. It is thus requested that a hearing be set on the merits of the foregoing motion and that judgment be entered in accordance with the terms of the proposed judgment and stipulation previously filed herein.

/s/ THOMAS H. TONGUE, III.

Subscribed and sworn to before me this 19th day of December, 1949.

[Seal] /s/ W. CASE,
Notary Public for Oregon.

My Commission Expires: 3/14/53.

[Endorsed]: Filed Dec. 19, 1949.

[Title of District Court and Cause.]

SUPPLEMENTAL COMPLAINT

Come now the plaintiffs and for supplemental complaint herein by reason of facts occurring since the original complaint was filed herein allege as follows:

I.

That jurisdiction of the Court over the cause of action alleged herein is based upon Rule 15(d) of the Federal Rules of Civil Procedure and upon Section 3(a) and (d) of the Portal to Portal Act of 1947 and also upon the fact that all of the plaintiffs are residents and inhabitants of states other than that of the defendant herein and that this cause involves the claim of plaintiffs for in excess of $3,000.00.

II.

That since the filing of the complaint herein and on or about April 19, 1946, the parties hereto agreed upon a compromise and settlement of this cause and said compromise and settlement was duly approved on behalf of the United States by the U. S. Maritime Commission and United States Attorney; that said cause is a cause of action or a cause to enforce a cause of action arising under the Fair Labor Standards Act of 1949; that said compromise and settlement was of a bona fide dispute as to the amounts payable by defendant, as employer, to plaintiffs, as employees, required to be under and by virtue of said Act and was a compromise and settlement authorized by and under said Act and

was also thereafter authorized, approved and ratified by and under Section 3(a) and (d) of the Portal to Portal Act of 1947.

III.

That said compromise provided that defendant should pay to plaintiffs the sum of $17,387.83, all as itemized and set forth more particularly in the schedule attached hereto, marked Exhibit A, and by this reference made a part hereof, together with $3500.00 as attorneys' fees and $17.48 as costs.

IV.

That thereafter defendant refused and still refuses to make the payments agreed upon under said compromise and settlement.

Wherefore, plaintiffs pray for judgment against defendants in the sum of $17,387.83 and for the sum of $3500.00 as attorneys' fees and $17.48 for costs and disbursements.

HICKS, DAVIS & TONGUE,

/s/ THOMAS H. TONGUE III,

/s/ JOHN MOWRY,

Attorneys for Plaintiffs.

EXHIBIT A

Name	Total
Macklin, L. I.	$ 348.56
Maple, Len A.	560.10
Hess, George W.	223.73
Yeo, R. F.	598.95
Sundberg, Erick E.	300.63
Stoneman, J. H.	527.94
Imus, W. G.	626.67
Culver, C. E.	428.42
Warrick, A. F.	196.02
Hill, John J.	630.70
Knox, J. J.	559.54
Johnson, E. R.	455.60
Williams, M. F.	595.78
Weigel, H. J.	350.47
Hanson, H. O.	527.20
Todd, Arthur B.	215.68
Holden, John T.	118.86
Rogers, S. M.	188.30
Chase, Daniel J.	523.06
Popma, John	641.97
Nickels, George F.	130.64
Penniwell, R. J.	464.03
Craig, T. W.	487.85
Carlyle, Herbert J.	60.65
Bryant, James O.	99.28
Dean, G. G.	60.81
Cronin, J. E.	531.02
Carr, H. E.	550.05
True, G. O.	89.18
Rawls, O. L.	334.41

Exhibit A—(Continued)

Name	Total
Peddicord, W. J.	404.99
Bjornsgaard, O. P.	601.79
Glennon, Arthur E.	426.81
Lancaster, Orval L.	244.33
Cox, W. J.	279.75
Krigbaum, Claude F.	74.97
Collier, L. W.	67.80
Van Hook, John H.	426.66
Johnson, Arthur E.	305.54
Nordeide, R. I.	429.14
Mainard, Lee	81.42
Cash, B. L.	437.32
Hunt, Perry	103.17
Monrean, Charles H.	510.79
Taulbee, W. T.	244.09
Dopp, George E.	388.12
Maynard, Theodore F.	74.74
Long, Marion M.	241.22
Griffin, W. C.	142.24
Wilson, Charles J.	476.84
Total	$17,387.83

[Endorsed]: Filed Dec. 19, 1949.

[Title of District Court and Cause.]

December 12, 1949

Before: Honorable James Alger Fee,
Judge.

Appearances:

MR. THOMAS H. TONGUE,
Of Attorneys for Plaintiffs.

MR. RICHARD DEVERS,
Of Attorneys for Defendant.

TRANSCRIPT OF PROCEEDINGS

The Court: Call calendar. Civil 3000, Macklin v. Kaiser.

Mr. Tongue: If the Court please, I reported to the Court last week that I had not received instructions from Mr. Mowry in behalf of plaintiffs as to what his intention was as to proceeding with the case. I now have had that opportunity, and on behalf of plaintiffs we will desire to continue the case. We would like to have one week in which to further plead or to file a motion, perhaps, for leave to file a supplemental complaint in the case. We will want to continue the case, your Honor, and this litigation.

The Court: I don't know whether I am going to do that or not. This has been lying here for years.

Mr. Tongue: That is right.

The Court: I gave you to this time on the theory that you were going to get rid of it and settle it.

Mr. Tongue: We have been unable to reach a settlement. Much of that time, of course, we were both waiting to see what the court did in the Potter case on the appeal. If your Honor desires to dismiss it we naturally cannot consent to it, and we would like to have an opportunity to preserve our record in that respect.

The Court: It lays here for years and then you come in and ask to amend the pleadings after that length of time. I think you are asking a good deal of the Court.

Mr. Tongue: This case has involved rather peculiar circumstances, your Honor. You will recall, of course, that it was filed prior to the passage of the Taft-Hartley Act, and over a year after it was filed the Taft-Hartley Act was passed. Then the portal-to-portal act was passed, and then the Potter case [2*] went up on appeal. That was as not decided until sometime early this year. Now I grant that perhaps all of us have not been as diligent as we should have been in pursuing the matter, but it is at issue and has been for some time. As the pleadings now stand the defendant has filed an answer, so that it is at issue on that answer.

The Court: What is the point about it? Why haven't you tried it in all of these years?

Mr. Tongue: I have no further explanation other than that to give your Honor.

The Court: The Potter case has been tried. Why wasn't this one tried?

Mr. Tongue: We didn't feel that we wanted to incur the expense to ourselves and our clients to try

*** Page numbering appearing at top of page of original Reporter's Transcript of Record.**

this case if it was not necessary until the Potter case was decided on appeal.

The Court: The Potter case has now been decided, and now you decide, in the face of the Potter case, that you are going to go ahead.

Mr. Tongue: Yes, that is right.

The Court: Of course, you know I could have treid this case a good many years ago, as far as I am concerned.

Mr. Tongue: I realize that.

The Court: I think that there wasn't anything in the case before the passage of the Taft-Hartley Act, and I don't think so yet, as far as I am concerned. [3]

Mr. Tongue: I understand that. We simply want to protect our record, your Honor.

The Court: What do you want to do? File an amended complaint?

Mr. Tongue: That is our desire, and we would like one week in which to file a motion for leave to do so, and then your Honor could decide whether you want to allow us to do that or not, if you don't want to make that decision now.

The Court: I will hold it for dismissal for failure to prosecute, but you can tender an amended complaint. I will look your amended pleading over and see whether I think there is any grounds to go ahead.

Mr. Devers: If your Honor please, I understand that the supplemental complaint which counsel propose to file may be based upon a new cause of action. If that is the case, I think we want to bring the

Maritime Commission up to date on the case and be guided by their instructions. We may want to oppose that, if it is done on motion.

The Court: I am saying that I am not doing anything. I am holding this case for dismissal. I think there has been a great deal of laches and lack of diligence upon the part of plaintiffs to ever want to try this case. Now, obviously enough, I am not going to allow a different cause of action, but I will give them the opportunity to tender an amended complaint. If I am not satisfied with the amended complaint I am going to dismiss this [4] for failure to prosecute. There has been a failure to prosecute for a great many years, and I am not going to be very much disturbed by the suggestion that there may be a new cause of action injected into it. So you may tender any complaint that you want to in a week.

Mr. Tongue: One week, your Honor. It will probably be a supplemental complaint we would like to tender, if we may do that.

The Court: Yes, that is all right. You can tender it. As I say, I think I am going to dismiss this case, but I want to know what you have in mind.

Mr. Tongue: Yes, very well.

The Court: I think you have been out of court for several years myself.

(Whereupon proceedings in the above matter on said day were concluded.)

[Title of District Court and Cause.]

January 3, 1950

(The following further oral proceedings were had herein:)

Appearances:

MR. THOMAS H. TONGUE,
Of Attorneys for Plaintiffs.

MR. RICHARD DEVERS,
Of Attorneys for Defendant.

Mr. Tongue: May it please the Court, this is a motion on behalf of plaintiffs in the case of Macklin, and others, vs. Kaiser Company, Civil No. 3000.

This motion is in alternative form. The first alternative asks for the entry of judgment based on stipulation of the parties previously filed herein. The second alternative asks for the entry of judgment as previously stipulated by the parties as a matter of summary judgment based on an affidavit showing, as we contend, that there is no genuine issue as to any disputed fact. The third alternative, in the event the other two are denied, is for leave to file a supplemental complaint setting up a cause of action based on what we claim to be a compromise settlement effected by the stipulation filed in this case.

Before proceeding further, however, there is the matter which your Honor mentioned at the last call of this case. That is whether, in view of the lapse

of time, the plaintiff will be permitted to proceed further or whether the case will now be [6] dismissed for lack of prosecution. As to the reasons why plaintiffs submit that they should be permitted to proceed further with this case we refer the Court to the affidavit attached to our motion. I think to save time if the Court desires simply to look over that affidavit rather than for me to summarize it——

The Court: I have read it, Mr. Tongue.

Mr. Tongue: I think, though, I would like to have the record show, if it is a fact, and I understand that it is, that counsel for defendant is not joining in a request that the case be dismissed for lack of prosecution and does not, so far as the defendant is concerned, object to plaintiffs continuing with this case. Is that correct, Mr. Devers?

Mr. Devers: In so far as dismissal for want of prosecution is concerned that is correct, your Honor.

The Court: I think in view of that situation the Court will not dismiss the case on its own motion.

Mr. Tongue: Very well. I appreciate that, your Honor. Now, so far as the merits of the motion are concerned, your Honor, I won't cover the matters that have been previously considered by the Court.

(The motions herein were argued at length by counsel, during the course of which the following occurred:)

Mr. Devers: Now, as I understand that as to the motion for [7] the entry of summary judgment based upon the affidavit which counsel has filed it is his position that if some of the issues, the legal

questions, which were raised in the Court's opinion heretofore filed or any part of them still need to be tried, then it is the suggestion of counsel that the record in the Potter case is adequate to enable the Court to determine those questions. Now we agree, subject to the Court's approval, of course, that the record in the Potter case on those issues is pertinent to this case, and we would be willing to stipulate that it become a part of the files and records of this case. I would like to reserve, however, in so far as the defendant is concerned, the opportunity if we reach that stage in this case to determine whether or not that record is wholly in and of itself adequate to enable the Court to determine those issues.

The Court: I am going to state right now if I ever proceed with this case any further we are going through a pre-trial conference and trial and everything else. I am not going to decide it on anybody else's record. If you want to introduce that record at the trial, that is another thing. I am not going to permit this to proceed upon the stipulation of counsel that some other record controls. I am going to find out before we start into this thing what the issues are to try, and I am going to find that out by pre-trial conference. When we get through with that, then I will make up my mind, and I imagine at that time both counsel will want to make up their minds, as to whether they are going to want to introduce other evidence or not.

Mr. Devers: I understand.

Mr. Tongue: That is agreeable with us, your Honor.

(Further argument by counsel.)

The Court: Of course, there is one thing that is outstanding in this argument, and that is the entire disregard of the suggestion made by the Court in its previous opinion that the Government of the United States is a party in interest, which everybody knows. I know it and all the rest of you know it. Now what are you going to do about that?

Mr. Tongue: As I recall the record, your Honor, Mr. Hess did appear here in this Court and indicated on behalf of the United States that the United States had approved the settlement. Now there was not a formal appearance as a party by the United States.

The Court: He very carefully guarded himself in making those statements, as the record will show.

Mr. Tongue: Yes.

The Court: He made a lot of qualifications, and I took it that he was not appearing in behalf of the United States. He put himself in here as being more or less attending at the request of the Court.

Mr. Tongue: As I understood the opinion, while it was true [9] that the Court raised the question squarely as to whether the Kaiser Company was an employer in its own right or whether it was simply an agent of the United States, my understanding, although it may have been mistaken, of what the Court had in mind was that there should be perhaps evidence on that question in this case that would reveal that status of the defendant as to whether it was an employer or an agent. I did not understand that to be a suggestion that the Government should be made a formal party to these proceedings.

The Court: No; what I said was that you could not compromise these claims which eventually would have to be paid by the Government of the United States in this lawsuit between the two of you without the Government being here.

Mr. Tongue: Yes.

The Court: That is what I said in the opinion, and I still think that that position is a good one.

Mr. Tongue: Our position is that there is an adequate showing that the Government has consented to the settlement. There is, I believe, as an exhibit in this case a telegram from the Maritime Commission to that effect, and there was also the appearance of the U. S. Attorney indicating, at least to my understanding, that the Government consented and agreed to the settlement.

The Court: The Government was not a party.

Mr. Tongue: Of course, from our standpoint it was not [10] necessary to make the Government a party.

The Court: I still think that there is this proposition that you have to get around somehow, and I don't see that anybody has gotten around it, that the Government of the United States is ultimately responsible. I said that you could not settle this case between yourselves in this lawsuit, between Macklin and the Kaiser Company, and it was beyond the power of the Court to enter any such judgment. I have seen yet no escape from it, and I don't see any here. I am not going to rule just at present. I will give you time to look this over, but

I just don't see any escape from the previous opinion.

Mr. Tongue: May we have an opportunity to examine that question and file a memorandum on it?

The Court: Yes.

Mr. Devers: If the Court please, may I ask whether, in order that I understand the Court's position, that is the only barrier raised by the Court's opinion now on file to the entry of judgment?

The Court: The Court's opinion is on file, and it speaks for itself. That is all I can say about it.

Mr. Devers: Very well.

Mr. Tongue: I think that is all, your Honor.

(Whereupon proceedings in the above matter on said day were concluded.) [11]

July 3, 1950

(The following further oral proceedings were had herein:)

Appearances:

MR. EDWARD D. HICKS,
Of Attorneys for Plaintiffs.

MR. RICHARD DEVERS,
Of Attorneys for Defendant.

The Court: Civil 3000. Macklin v. Kaiser.

Mr. Hicks: May it please your Honor, the various motions or, rather, alternative bases for relief on motion have been submitted to the Court and

briefs have been filed. I believe it is in that status and I think all that remains is for your Honor to make a ruling. As I understand it, it is in the bosom of the Court.

The Court: I see. I don't know how it got on this calendar, because it is not on my submitted book. If that is the size of it I will go ahead and dispose of it.

Mr. Hicks: That is my understanding.

Mr. Devers: That is right. I might say, if the Court please, a memorandum has been filed by plaintiff in the case but the defendant has not filed any memorandum of authorities. I think your record shows that.

The Court: You don't want to?

Mr. Devers: No, we don't propose to, if the Court please.

The Court: That is the point about it. That is how it [12] happens not to have been brought in to me as submitted, because you didn't file anything. They were holding it, apparently. If that is your conclusion I will now proceed to dispose of it.

Mr. Devers: I might say, your Honor, for the record and for the Court's information also that the defendant entered into a stipulation, which is of record in the case, in good faith and the defendant is willing to abide by the stipulation and has no objection to the entry of judgment in accordance with the stipulation.

Mr. Hicks: I can't inform your Honor whether or not the Maritime Commission, who initially had some information in this, has entered any objection.

I can't make any representation on that, but certainly none has come forward that we know of, or any objection on the part of any governmental agency.

The Court: No, I don't think they would object. The question is whether I will go along with you.

Mr. Hicks: Yes, I understand.

The Court: That is the question in this case.

(Whereupon proceedings in the above matter on said day were concluded.) [13]

[Title of District Court and Cause.]

July 31, 1950

Before: Honorable James Alger Fee,
Judge.

PROCEEDINGS

The Court: In the case of Macklin vs. Kaiser Company, Civil 3000, the Court has again reviewed this situation and finds now that there are motions on file in this case. After the Court had suggested a dismissal for want of prosecution plaintiff filed a three-pronged motion demanding judgment in accordance with a stipulation which was for judgment, and which was apparently with the consent of the Maritime Commission of the United States. The Court in its previous opinion announced that there would be no judgment in accordance with the stipulation, and the Court disapproved the entire proceeding. [14] Therefore, the Court will not grant that phase of the motion.

Likewise, there is a motion for summary judgment on the record. The record does not show jurisdiction of the Court, and therefore the Court is not going to grant any summary judgment on the record.

Permission is asked to file a supplemental complaint. This phase of the motion is also denied because of the fact that there is no basis for filing a supplemental complaint at the present time. The situation has not changed whatsoever, and this matter was all gone through before the original passage of the Taft-Hartley Bill, which would seriously affect it. Bonner vs. Elizabeth Arden, Inc., Second Circuit, 177 Fed. (2d) 703, is squarely on the point. That says it is not proper to permit a supplemental complaint to be filed under those circumstances.

The Court was well advised to dismiss this case for want of prosecution. The matter has been pending here for a great length of time, and the Court announced its opinion several years ago, in 69 Fed. Supplement at 137.

This case was originally filed relating to overtime work supposed to have been done by guards at the Kaiser plant. Under the circumstances the Court sees no reason why some action has not been taken, the original complaint being filed December 7th, 1945. [15]

Therefore, the cause is now dismissed for want of prosecution, and the Court will set up in the order all of the delays that have taken place in a period of some five years. [16]

REPORTER'S CERTIFICATE

I, John S. Beckwith, an Official Reporter of the above-entitled Court, do hereby certify that on December 12, 1949, January 3, July 3, and July 31, 1950, I reported in shorthand the proceedings had in the above-entitled matter; that I thereafter caused my shorthand notes to be reduced to typewriting under my direction, and that the foregoing transcript, consisting of pages numbered 1 to 16, both inclusive, constitutes a full, true and correct transcript of said proceedings (excluding argument on the motions January 3, 1950) so taken by me in shorthand on said dates, as aforesaid, and of the whole thereof.

Dated this 16th day of September, 1950.

/s/ JOHN S. BECKWITH,
Official Court Reporter.

[Endorsed]: Filed Oct. 2, 1950. [17]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that L. I. Macklin, Len A. Maple, George W. Hess, R. F. Yeo, Erick E. Sundberg, J. H. Stoneman, W. G. Imus, C. E. Culver, A. F. Warrick, John J. Hill, J. J. Knox, E. R. Johnson, Mr. F. Williams, H. J. Weigel, H. O. Hanson, Arthur B. Todd, John T. Holden, S. M. Rogers, Daniel J. Chase, John Popma, George F. Nickels,

R. J. Penniwell, T. W. Craig, Herbert J. Carlyle, James O. Bryant, G. G. Dean, J. E. Cronin, H. E. Carr, G. O. True, O. L. Rawls, W. J. Peddicord, O. P. Bjornsgaard, Arthur E. Glennon, Orval L. Lancaster, W. J. Cox, Claude F. Krigbaum, L. W. Collier, John H. Van Hook, Arthur E. Johnson, R. I. Nordeide, Lee Mainard, B. L. Cash, Perry Hunt, Charles H. Monrean, W. T. Taulbee, George E. Dopp, Theodore F. Maynard, Marion M. Long, W. C. Griffin and Charles J. Wilson, the plaintiffs above named, and each of them, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from that certain order and judgment of this Court, made and entered on July 31, 1950, dismissing the above cause for want of prosecution and denying plaintiffs' motion filed herein on December 19, 1949, praying for entry of judgment, for entry of summary judgment, or, in the alternative, for leave to file a supplemental complaint herein.

Dated August 30, 1950.

/s/ HICKS, DAVIS & TONGUE,

/s/ THOMAS H. TONGUE, III,
Attorneys for Appellants.

Service accepted.

[Endorsed]: Filed Aug. 30, 1950.

The United States District Court of the District of Oregon

Civil No. 3000

L. I. MACKLIN, et al.,

Plaintiffs,

vs.

KAISER COMPANY, INC.,

Defendant.

ORDER DENYING MOTIONS AND DISMISSING CAUSE

On January 3, 1950, came on to be heard the plaintiffs' motions for entry of judgment, or, in the alternative, for entry of summary judgment, or, in the alternative, for leave to file supplemental complaint, the plaintiffs appearing by Thomas H. Tongue, III, of their attorneys, and the defendant appearing by Richard Devers, of its attorneys, and the Court having heard the arguments of counsel, reserved its ruling on the motions and granted the parties additional time to reconsider the Court's opinion rendered herein on December 20, 1946, and to submit memoranda for and against the said motions. The plaintiffs, by Thomas H. Tongue, III, and the firm of Hicks, Davis & Tongue, of their attorneys, having on January 23, 1950, filed a memorandum in support of the said motions, and the defendant, by Richard Devers, of its attorneys, having waived the privilege of submitting a memorandum, the Court having read the plaintiffs' memo-

randum and being fully informed in the matter, now makes the following

Findings as to Prosecution of the Case

From the records of this Court, the history of the prosecution of this case appears to be as follows:

I.

The original complaint herein was filed on December 7, 1945.

II.

On December 27, 1945, the defendant filed a motion for an order granting it 20 days' additional time in which to answer or otherwise plead in this action, and on December 27, 1945, the Court entered an order granting the motion.

III.

On January 17, 1946, the defendant filed a motion for an order granting it 30 days' additional time in which to answer or otherwise plead in this action, and on January 17, 1946, the Court entered an order granting the motion.

IV.

On January 21, 1946, the Court set this action for call on February 18, 1946.

V.

On January 30, 1946, the plaintiffs filed their motion, based upon the affidavit of one of the attorneys for the plaintiffs and upon the stipulation

of the parties through their respective attorneys, for an order granting plaintiffs leave to file a supplemental complaint, and on January 30, 1946, the Court entered an order granting the motion, and the supplemental complaint was thereupon filed.

VI.

On February 18, 1946, the defendant filed an answer to plaintiffs' complaint and supplemental complaint herein.

VII.

On February 18, 1946, this action came on before the Court on call. At that time Fletcher Rockwood, of attorneys for defendant, stated that negotiations had been carried on by the attorneys for the parties and that a settlement had been agreed upon subject, however, to the approval of the United States Maritime Commission and the United States Attorney. The Court thereupon informed the attorneys for the parties that any settlement would be subject to the Court's approval, particularly as to attorneys' fees and that testimony on the subject of attorneys' fees would be required.

VIII.

On February 19, 1946, this action was set for call on March 18, 1946, and on that date the Court set the date of March 20, 1946, at 10 o'clock a.m. as the date and hour for the taking of testimony in support of the settlement which had been reached by the parties.

IX.

On March 20, 1946, the Court extended the time for taking testimony in support of the said settlement to March 29, 1946, and on March 29, 1946, on the motion of the plaintiffs, the Court postponed the time for the taking of testimony in support of said settlement to April 19, 1946, and on March 30, 1946, an order to that effect was entered by the Court.

X.

On April 19, 1946, the parties filed the following:

Stipulation for judgment;

Judgment;

Stipulation waiving findings of fact and conclusions of law, notice of entry of judgment, right to motion for new trial, and right of appeal.

On the same date the plaintiffs filed a motion and a stipulation for dismissal of the cause as to James W. Fader and Clinton A. Warriner and the Court entered an order dismissing the cause as to said plaintiffs.

XI.

Hearings in support of said settlement were held in this Court on April 19, 1946, and April 22, 1946. At the hearings a number of the plaintiffs testified, as well as an employee of the defendant, and the United States Attorney for the District of Oregon appeared and participated therein. At the conclusion of the hearings the Court ordered a transcript of the testimony and took the matter under advisement. On April 23, 1946, plaintiffs filed their

exhibits 1 to 10 inclusive and defendant filed its exhibits 11 and 12. Subsequently, on May 13, 1946, the Court called upon the attorneys for the respective parties to appear at which time the Court raised the question of whether in view of the decision of the United States Supreme Court in the case of D. A. Schulte, Inc. v. Gangi, 328 U. S. 108, 66 S. Ct. 925, the Court had power to approve the proposed settlement. On motion of the attorneys for the defendant, plaintiffs' attorneys consenting, the Court directed the parties to submit briefs on the question of the validity of the settlement, and granted all interested parties 30 days in which to file their briefs.

XII.

On June 11, 1946, on motion of the defendant and based upon a stipulation of the parties, the Court extended the time to file briefs to June 21, 1946.

XIII.

On June 27, 1946, the plaintiffs filed their memorandum in support of the proposed settlement and on June 24, 1946, on motion of defendant, the Court granted defendant additional time in which to file its brief.

XIV.

On July 8, 1946, the defendant filed its memorandum in support of the proposed settlement.

XV.

On December 20, 1946, the Court rendered a written opinion in which the Court, for the reasons

therein stated, rejected the proposed stipulation, refused to sign and enter the proposed judgment, and ruled that unless other matters were shown, the case would be dismissed.

XVI.

On February 3, 1947, plaintiffs filed interrogatories to be answered by the defendant.

XVII.

On February 14, 1947, pursuant to a stipulation of attorneys for the parties, the Court extended the time in which the defendant might answer or object to plaintiffs' interrogatories to March 18, 1947.

XVIII.

On March 27, 1947, the Court, pursuant to a stipulation of attorneys for the parties, extended the time in which the defendant might answer or object to plaintiffs' interrogatories to April 8, 1947.

XIX.

On April ., 1947, the defendant filed its objections to plaintiffs' interrogatories, and on April 10, 1947, the Court continued the defendant's objections to plaintiffs' interrogatories for future hearing.

XX.

On May 7, 1947, the Court set the defendant's objections to plaintiffs' interrogatories for hearing on May 19, 1947.

XXI.

On May 19, 1947, pursuant to the stipulation of

attorneys for the parties, the Court entered an order withdrawing plaintiffs' interrogatories without prejudice to plaintiffs' right to file further interrogatories.

XXII.

On May 20, 1947, the Court set this cause for call on July 14, 1947, and on the date the Court reset this cause for call on August 4, 1947.

XXIII.

On August 4, 1947, this action came before the Court on call and at that time the defendant stated through its attorneys that it wished to file an amended answer. The Court thereupon set the case for call on September 2, 1947, and on that date the Court allowed the defendant 10 days in which to file its amended answer and reset the case for call on September 12, 1947.

XXIV.

On September 12, 1947, this action came before the Court on call and at that time the Court, pursuant to stipulation of attorneys for the parties, granted the defendant until September 22, 1947, in which to file its amended answer, and an order to that effect was entered on September 13, 1947.

XXV.

On September 22, 1947, the parties through their attorneys filed a stipulation that the defendant might file its amended answer, and on that date the Court entered an order permitting the filing

of such answer, and such answer was thereupon filed.

XXVI.

On October 9, 1947, the Court set this cause for call on October 20, 1947, and on that date the Court set this case for pre-trial conference on November 17, 1947. On November 17, 1947, the pre-trial conference was set over to November 18, 1947, and at said time the Court because of other pre-trial conferences and scheduled jury trials, postponed indefinitely the resetting of a pre-trial conference in this cause.

XXVII.

No action of any kind was taken in this case from November 18, 1947, until November 28, 1949. On June 25, 1947, a companion case pending in this Court entitled C. T. Potter, et al. v. Kaiser Co., Inc., Civil No. 3030, came on for hearing before Honorable Claude McColloch, Judge of this Court, and the defendant herein and therein moved that said Potter case be dismissed pursuant to the provisions of Section 2(a) of the Portal-to-Portal Act of 1947, and said motion was granted orally by Judge McColloch on June 26, 1947, a judgment of dismissal being thereafter entered on January 21, 1948. An appeal was then taken by the plaintiffs in said action to the United States Court of Appeals for the Ninth Circuit, and said appeal was decided by said Court of Appeals on January 10, 1949, the judgment of dismissal being affirmed.

Shortly after the oral decision of Judge McColloch was made granting the motion to dismiss in the Potter case, and when it became certain that

the plaintiffs in said action intended to pursue an appeal to the Court of Appeals from said order of dismissal, it was agreed between counsel for the plaintiffs in the present case and counsel for the defendant in the present case that further proceedings in this case should be suspended until the appeal in the Potter case had been finally determined. The mandate from the Court of Appeals in the Potter case was received by the Clerk of this Court on the 14th day of February, 1949.

On November 28, 1949, the Court set this case for call on December 5, 1949. On that call date the attorney for the plaintiffs in this case stated, in effect, that in view of the enactment of the Portal-to-Portal Act of 1947 and the decision of the Court of Appeals in the Potter case, he wanted an opportunity to determine whether to continue the prosecution of this case. The Court indicated that the case might be dismissed on the Court's own motion for want of prosecution. The Court then reset the case for call on December 12, 1949.

XXVIII.

This cause came before the Court on call on December 12, 1949, and at that time the attorney for the plaintiffs stated that plaintiffs would continue with the prosecution of the case and desired to file a supplemental complaint. The Court thereupon permitted the plaintiffs to tender a supplemental complaint for the Court's consideration.

XXIX.

On December 19, 1949, the plaintiffs filed the

above mentioned motions for entry of judgment or, in the alternative, for entry of summary judgment or, in the alternative, for leave to file a supplemental complaint, together with a supplemental complaint, a memorandum, and an affidavit of one of the attorneys for the plaintiffs in support of the motion.

XXX.

On December 20, 1949, the Court set the above motions for hearing on January 3, 1950, and on that date the matter was heard as hereinabove recited.

Now, Therefore, the Court being fully advised in the premises and being of the opinion that the plaintiffs' said motions are not well taken and should be denied, it is hereby

Ordered that the plaintiffs' motions for the entry of judgment or, in the alternative, for the entry of summary judgment, or, in the alternative, for leave to file supplemental complaint, be and the same hereby are denied.

And the Court being further of the opinion that the plaintiffs have failed to prosecute this action with proper diligence, it is hereby further

Ordered that this action shall be and the same hereby is dismissed for want of prosecution.

Dated July 31, 1950.

/s/ JAMES ALGER FEE,
District Judge.

[Endorsed]: Filed Sept. 29, 1950.

[Title of District Court and Cause.]

STATEMENT OF POINTS ON WHICH PLAINTIFFS-APPELLANT INTEND TO RELY ON APPEAL

Plaintiffs and appellants hereby designate the following points on which they intend to rely on the appeal of the above-entitled cause:

1. The District Court erred in failing and refusing to enter judgment based upon the stipulations of the parties for entry of judgment and the express consent of defendant and of the United States of America for the entry of such judgment.

2. The District Court erred in denying plaintiffs' motions for entry of judgment or, in the alternative, for the entry of summary judgment, or, in the alternative, for leave to file supplemental complaint.

3. The District Court erred in dismissing the action for want of prosecution.

Dated this 2nd day of October, 1950.

/s/ THOMAS H. TONGUE, III,
Of Attorneys for Plaintiffs
and Appellants.

Service of the foregoing statement of points on which plaintiffs-appellant intend to rely on appeal is hereby accepted this 2nd day of October, 1950.

/s/ RICHARD DEVERS,
Of Attorneys for Defendant-
Respondent.

Copy of above received this 2nd day of October, 1950, but Service not accepted.

!s/ HENRY L. HESS,
United States Attorney for
the District of Oregon.

[Endorsed]: Filed Oct. 2, 1950.

[Title of District Court and Cause.]

ORDER

This matter having come on for hearing in open court and based upon the motion of plaintiffs for an extension of time in which to file the record on appeal in the above-entitled cause, and good and sufficient reasons appearing therefor, it is hereby

Ordered that the time for filing the record on appeal in the above-entitled cause with the Circuit Court of Appeals for the Ninth Circuit shall be and is hereby extended to and including the 16th day of October, 1950.

Dated this 6th day of October, 1950.

/s/ CLAUDE McCOLLOCH,
U. S. District Judge.

[Endorsed]: Filed Oct. 6, 1950.

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD ON APPEAL

Come now the plaintiffs and appellants herein and, pursuant to Rule 75 of the Federal Rules of Civil Procedure, hereby designate the portions of the record, proceedings, and evidence to be contained in the record on appeal in the above-entitled cause to be as follows:

Complaint, filed 12/7/45.

Supplemental complaint, filed 1/30/46.

Answer, filed 2/18/46.

Order of dismissal as to James W. Fader and Clinton A. Warriner, filed 4/19/46.

Stipulation re testimony of George Mowry, et al., filed 4/19/46.

Stipulation waiving findings of fact and conclusions of law, notice of entry of judgment, right to motion for new trial and right of appeal, filed 4/19/46.

Stipulation for judgment, filed 4/19/46.

Proposed form of Judgment, filed 4/19/46.

Exhibits: Plaintiffs' 1 to 10, Defendants' 11 and 12, filed 4/23/46.

Transcript of testimony and proceedings on 4/19 and 4/23/46, filed 5/9/46.

Transcript of opinion filed 5/20/46.

Transcript of opinion filed 12/23/46.

Amended Answer, filed 9/22/47.

Order setting case for pre-trial conference, entered 10/27/47.

Any order entered on November 18, 1947, postponing said pre-trial conference indefinitely.

Motion for entry of stipulated judgment or, in the alternative, for entry of summary judgment or for leave to file supplemental complaint, with attached affidavit and Exhibits 1 and 2, filed 12/19/49.

Supplemental Complaint, filed with foregoing motion.

Transcript of proceedings December 12, 1949.

Transcript of proceedings January 3, 1950.

Transcript of proceedings July 3, 1950.

Transcript of proceedings, oral opinion, and oral order of dismissal July 31, 1950.

Notice of Appeal, filed August 30, 1950.

Opinion dated 8/31/50.

Order of dismissal dated July 31, 1950, and filed 9/29/50.

Transcript of Docket Entries.

Statement of points on which appellants intend to rely on appeal.

This designation.

Dated this 2nd day of October, 1950.

/s/ THOMAS H. TONGUE, III,
Of Attorneys for Plaintiffs
and Appellants.

Service accepted.

/s/ RICHARD DEVERS,
Of Attorneys for Defendant-
Respondent.

Copy of above received this 2nd day of October, 1950, but Service not accepted.

/s/ HENRY L. HESS,
United States Attorney for
the District of Oregon.

[Endorsed]: Filed Oct. 2, 1950.

[Title of District Court and Cause.]

APPELLEE'S DESIGNATION OF ADDITIONAL PORTIONS OF RECORD ON APPEAL

The appellee, Kaiser Company, Inc., hereby designates the following additional portions of the record and proceedings in this case to be contained in the Record on Appeal:

Transcript of proceedings on December 5, 1949;

Appellee's designation of additional portions of Record on Appeal.

/s/ RICHARD DEVERS,
HART, SPENCER, McCULLOCH, ROCKWOOD, DEVERS,
Of Attorneys for Appellee,
Kaiser Company, Inc.

Copy of above received this 11th day of October, 1950, but Service not accepted.

/s/ EDWARD B. TURNING,
Asst. U. S. Atty.

Service accepted.

/s/ THOMAS H. TONGUE, III,
Of Attorneys for Plaintiffs.

[Endorsed]: Filed Oct. 11, 1950.

[Title of District Court and Cause.]

TRANSCRIPT OF PROCEEDINGS

The Court: Call Calendar. Civil 3000, Macklin vs. Kaiser.

Mr. Tongue: If the Court please, the Court will recall that case involves a suit against the Kaiser Company in which a settlement was submitted to this Court for approval and the Court finally did not approve the settlement. Following that a similar case involving identical issues, the Potter case, went up from Judge McColloch to the Circuit Court of Appeals and was affirmed by that court. That is, the affirming decision was in favor of the defendants.

I think that quite likely, in view of those facts, the plaintiffs will not desire to press the matter further. However, this case is Mr. Mowry's, with whom we are associated, and although I have discussed the matter with Mr. Mowry I do not have at this time authority so to advise the Court. So I would suggest, if it is agreeable to the Court, that the matter be continued on call for one week, at which time I would hope to have discussed the matter further with Mr. Mowry and be in a position to advise the Court definitely of the plaintiffs' position

as to whether or not plaintiffs will want to continue this matter any further or make any further attempt to prosecute the case.

Mr. Devers: Satisfactory to the defendant.

The Court: All right. Set over until next Monday.

(Whereupon proceedings in the above matter on said day were concluded.)

Reporter's Certificate

I, John S. Beckwith, hereby certify that I am a duly appointed, qualified and acting official court reporter of the above-entitled court; that as such official court reporter I reported in shorthand certain proceedings had on December 5, 1949, in the above-entitled matter, that I subsequently reduced my shorthand notes thereof to typewriting, and that the foregoing transcript, pages 1 and 2, constitute a full, true and accurate transcript of said proceedings so taken by me on said day, and of the whole thereof.

Dated this 13th day of October, 1950.

/s/ JOHN S. BECKWITH,
Official Court Reporter.

[Endorsed]: Filed Oct. 13, 1950.

[Title of District Court and Cause.]

DOCKET ENTRIES

1945

Dec. 7—Filed complaint.

Dec. 8—Issued summons—to marshal.

Dec. 11—Filed summons.

Dec. 27—Filed motion for additional time to answer.

Dec. 27—Filed and entered order allowing an extension of 20 days to plead. Fee.

1946

Jan. 17—Filed Motion for additional time to answer or otherwise plead.

Jan. 17—Filed and entered order granting additional 30 days to answer. Fee.

Jan. 30—Filed motion for leave to file supplemental complaint.

Jan. 30—Filed stipulation to file supplemental complaint.

Jan. 30—Filed affidavit of Edwin D. Hicks.

Jan. 30—Filed and entered order allowing plaintiff to file supplemental complaint. Fee.

Jan. 30—Filed supplemental complaint.

Feb. 18—Filed answer of deft.

Mar. 30—Entered order setting for hearing on taking of proofs for April 19, 1946. Fee.

Apr. 19—Entered order permitting Gordon Johnson to appear of counsel for defendant pending general admission, record of hearing on application for judgment and order continuing to Apr. 23. Fee.

DOCKET ENTRIES—(Continued)

1946

Apr. 19—Filed motion to dismiss cause as to James W. Fader and Clinton A. Warriner.

Apr. 19—Filed stipulation to dismiss cause as to James W. Fader and Clinton A. Warriner.

Apr. 19—Filed & entered order dismissing cause as to James W. Fader and Clinton A. Warriner. Fee.

Apr. 19—Filed stipulation re testimony of Geo. Mowry, et al.

Apr. 19—Filed stipulation waiving findings of fact & conclusions of law, notice of entry of judgment, right to motion for new trial and right of appeal.

Apr. 19—Filed stipulation for judgment.

Apr. 23—Record of hearing on application for approval of settlement & for judgment-submitted. Fee.

Apr. 23—Filed exhibits: Plffs 1 to 10, Defts. 11 & 12.

May 9—Filed transcript of testimony and proceedings.

May 13—Record of opinion & order to submit question of validity of settlement on briefs & allowing parties 30 days to file briefs. Fee.

May 20—Filed transcript of oral opinion May 13, 1946.

June 11—Entered order allowing to June 21, 1946 file briefs. McC.

June 24—Entered order allowing deft. further time to file brief. Fee.

DOCKET ENTRIES—(Continued)

1946

June 27—Filed plaintiffs' memorandum in support of proposed settlement.

July 8—Filed defendant's brief.

Dec. 20—Record of opinion.

Dec. 23—Filed opinion.

Dec. 26—Filed transcript Dec. 20, 1946.

1947

Feb. 3—Filed plaintiffs' interrogatories.

Feb. 14—Filed stipulation for order extending time to answer ptffs interrogatories to March 18.

Feb. 14—Filed & entered order extending time to answer ptffs interrogatories to March 18. McC.

Feb. 27—Filed & entered order extending time to answer ptffs interrogatories to April 8, 1947. McC.

Feb. 27—Filed stipulation for order extending time to answer ptffs interrogatories to April 8, 1947.

May 17—Entered order allowing plaintiff to withdraw interrogatories. Fee.

May 19—Filed order allowing plaintiff to withdraw interrogatories. Fee.

Sept. 2—Entered order allowing defendant 10 days to answer. Fee.

Sept. 12—Filed stipulation for extension of time.

Sept. 13—Filed order extending time to file Amended Answer.

Sept. 22—Filed stipulation for amended answer.

1949

DOCKET ENTRIES—(Continued)

Sept. 22—Filed & entered order permitting filing of amended answer. Fee.

Sept. 22—Filed Amended answer to complaint & supplemental complaint.

Oct. 20—Entered order setting for pre-trial conference Nov. 17, 1947. Fee.

Dec. 19—Filed pltfs' motion for judgment, etc. & affidavit.

1950

Jan. 3—Record of hearing on motion of plaintiff for entry of judgment or in alternative for leave to file supplemental complaint, entered order continuing to further order on motion of counsel for respective parties. Fee.

Jan. 23—Filed plaintiffs' memoradum in support of motion for entry of judgment on stipulation.

July 31—Record of oral opinion. Fee.

July 31—Entered order dismissing for want of prosecution & all motions denied. Fee.

Aug. 30—Filed notice of appeal by plntfs.

Aug. 30—Filed bond for costs on appeal.

Aug. 30—Copies of notice of appeal mailed by appellants to Richard Devers and John R. Brooke.

Sept. 29—Filed order denying plaintiffs motions for entry of judgment or entry of summary judgment or for leave to file supplemental complaint & dismissing cause for want of prosecution. Fee.

DOCKET ENTRIES—(Continued)

1950

Oct. 2—Filed reporter's transcript, dated Dec. 12, 1949, Jan. 3, July 3, and July 31, 1950.

Oct. 2—Filed statement of points.

Oct. 2—Filed designation of contents of record on appeal.

Oct. 6—Filed motion for order extending time for filing & docketing appeal.

Oct. 6—Filed & entered order extending time for filing & docketing appeal to Oct. 16. McC.

Oct. 6—Filed motion for order to withdraw exhibits to send to U. S. Court Appeals.

Oct. 6—Filed & entered order to withdraw exhibits to send to U. S. Court Appeals. McC.

Oct. 11—Filed appellee's designation of additional portions of record on appeal.

Oct. 13—Filed in duplicate, transcript of proceedings 12/5/1949.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Oregon—ss.

I, Lowell Mundorff, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents consisting of complaint, Supplemental Compaint, Answer, Order dated April 19, 1946, Stipulation, Stipulation waiv-

ing findings of fact and conclusions of law, etc., Stipulation for judgment, Judgment, Opinion dated December 20, 1946, Amended Answer to Complaint and Supplemental Complaint, Order dated October 20, 1947, Motion for entry of judgment, etc., Notice of appeal, Bond for costs on appeal, Order denying motions and dismissing cause, Statement of points on which plaintiffs-appellant intend to rely, Order extending time for filing record on appeal, Order to forward exhibits, Designation of contents of record on appeal, Appellee's designation of additional portions of record on appeal, Transcript of docket entries and this certificate, constitute the record on appeal from a judgment of said court in a cause therein numbered Civil 3000, in which L. I. Macklin, et al. are plaintiffs and appellants and Kaiser Company, Inc. is defendant and appellee; that the said record has been prepared by me in accordance with the designation of contents of record on appeal filed by the appellant and appellee, and in accordance with the rules of this court.

I further certify that I am forwarding under separate cover transcript of testimony and proceedings dated April 19 and 23, 1946, transcript of oral opinion dated May 13, 1946, transcript dated December 20, 1946, transcript of proceedings dated December 12, 1949, January 3, 1950, July 3, 1950, and July 31, 1950, transcript of proceedings dated December 5, 1949, and transcript of proceedings dated June 24-26, 1947, Civil No. 3030 (Exhibit No. 2) together with exhibits 1 to 12 inclusive.

I further certify that the cost of filing notice of

appeal is $5.00 and that the same has been paid by the appellants.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 13th day of October, 1950.

LOWELL MUNDORFF,
Clerk.

[Seal] By /s/ F. L. BUCK,
Chief Deputy.

[Endorsed]: No. 12712. United States Court of Appeals for the Ninth Circuit. L. I. Macklin, et al., Appellants vs. Kaiser Company, Inc., Appellee. Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed October 16, 1950.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

[Title of Court of Appeals and Cause.]

STIPULATION RE DESIGNATION OF RECORD ON APPEAL

It is hereby stipulated by and between the parties hereto, through their respective undersigned attorneys, that for the purposes of Rule 19, subdivision 6, of the Rules of Practice of the above-entitled Court the entire record, as filed in this Court, and as set forth in the designations of record on appeal filed by both of the parties hereto in the United States District Court for the District of Oregon, shall constitute and shall be designated as the record on appeal in the above-entitled Court and shall be printed under the supervision of the Clerk of said Court, with the following exceptions which are to be omitted:

1. All captions and footings on pleadings, motions, orders, opinions and other documents to the extent deemed to be good practice by the clerk of the above-entitled court.

2. With reference to the complaint, designated as Item 1 of appellant's Designation of Contents of Record on Appeal in the United States District Court for the District of Oregon and which appears as item 1 of the original certified record, paragraphs VI to XXXVII thereof shall be omitted and that in lieu thereof the following shall be printed:

> "Paragraphs VI to XXXVII have been omitted in printing and consist of allegations similar to those of paragraph V for the follow-

ing additional plaintiffs in the following amounts:

	Back Wages Claimed	Liquidated Damages Claimed	Attorneys' Fees Claimed
6. Len A. Maple	$559.54	$559.54	$170.00
7. George W. Hess	207.42	207.42	60.00
8. R. F. Yeo	613.28	613.28	180.00
9. Eric E. Sundberg	315.31	315.31	90.00
10. J. H. Stone	510.97	510.97	150.00
11. W. G. Imus	632.21	632.21	190.00
12. C. E. Culver	331.88	331.88	100.00
13. A. F. Warrick	186.98	186.98	60.00
14. Arthur E. Glennon	460.30	460.30	140.00
15. J. J. Knox	560.44	560.44	170.00
16. E. R. Johnson	397.87	397.87	120.00
17. M. F. Williams	579.38	579.38	160.00
18. H. J. Weigel	341.44	341.44	100.00
18(2) H. O. Hanson	506.41	506.41	150.00
19. Arthur B. Todd	191.93	191.93	60.00
20. John T. Holden	123.98	123.98	40.00
21. S. M. Rogers	224.63	224.63	50.00
22. Daniel J. Chase	512.92	512.92	150.00
23. John Popma	597.80	597.80	180.00
24. George F. Nickels	125.40	125.40	40.00
25. T. W. Craig	514.02	514.02	150.00
26. Herbert J. Carlyle	64.13	64.13	20.00
27. James O. Bryant	94.05	94.05	30.00
28. G. G. Dean	85.50	85.50	30.00
29. Clinton A. Warriner	128.25	128.25	40.00
30. John L. Hill	570.00	570.00	170.00
31. R. J. Penniwell	463.41	463.41	140.00
32. J. C. Cronin	300.00	300.00	90.00
33. H. E. Carr	300.00	300.00	90.00
34. G. O. True	300.00	300.00	90.00
35. O. I. Rawls	300.00	300.00	90.00
36. W. F. Peddicord	300.00	300.00	90.00
37. O. P. Bjornsgaard	300.00	300.00	90.00"

3. With reference to the supplemental complaint, designated as Item 2 of appellant's Designation of Contents of Record on Appeal in the United States

District Court for the District of Oregon and which appears as item 2 of the original certified record, paragraphs IV to XX thereof shall be omitted and that in lieu thereof the following shall be printed:

"Paragraphs IV to XX have been omitted in printing and consist of allegations similar to those of paragraph III for the following additional plaintiffs in the following amounts:

	Back Wages Claimed	Liquidated Damages Claimed	Attorneys' Fees Claimed
4. W. J. Cox	$400.00	$400.00	$120.00
5. Claude F. Krigbaum	250.00	250.00	75.00
6. I. W. Collier	100.00	100.00	30.00
7. John H. Van Hook	450.00	450.00	135.00
8. Arthur E. Johnson	350.00	350.00	105.00
9. R. I. Nordeide	650.00	650.00	195.00
10. Lee Mainard	100.00	100.00	30.00
11. B. L. Cash	650.00	650.00	195.00
12. Perry Hunt	150.00	150.00	45.00
13. Charles J. Monrean	300.00	300.00	90.00
14. W. T. Taulbee	300.00	300.00	90.00
15. George E. Dopp	300.00	300.00	90.00
16. Theodore F. Maynard	300.00	300.00	90.00
17. Marion L. Long	300.00	300.00	90.00
18. W. C. Griffin	200.00	200.00	80.00
19. James F. Fader	50.00	50.00	15.00
20. Charles J. Wilson	300.00	300.00	90.00"

4. With reference to the original exhibits designated as Item 9 of appellants' Designation of Contents of Record on Appeal in the United States District Court for the District of Oregon, all such exhibits shall be printed except as follows:

A. Exhibits 3, 4 and 5 shall be omitted and in lieu thereof the following statements shall be inserted following the printing of Exhibit 1:

"Exhibits 3, 4 and 5 are identical with Exhibit 1 except that they consist of letters to

Alfred F. Warrick, W. F. Peddicord and L. I. Macklin."

B. Of the letters included in Exhibit 2 only the first letter, addressed to O. I. Rawls shall be printed, followed by the following statement:

"Exhibit 2 also includes identical letters to John H. Van Hook, J. C. Cronin, E. R. Johnson, Arthur E. Johnson, W. C. Griffin, George F. Nickels, George W. Hess, Marion M. Long, O. P. Bjornsgaard, James O. Bryant, Herbert J. Carlyle, H. E. Carr, B. L. Cash, L. W. Collier, Dan J. Chase, Thomas W. Craig, W. J. Cox, G. G. Dean, George E. Dopp, Arthur E. Glennon, H. O. Hanson, John J. Hill, John T. Holden, W. G. Imus, James J. Knox, Claude F. Krigbaum, Orval L. Lancaster, Len A. Maple, Lee Mainard, Theodore S. Maynard, C. H. Monrean, R. L. Nordeide, Roy J. Penniwell, John Popma, Scott M. Rogers, J. H. Stoneman, Eric E. Sundberg, W. T. Taulbee, Arthur B. Todd, L. O. True, Clinton A. Warriner, H. J. Weigel, Milton F. Williams, Chas. J. Wilson and Richard F. Yeo."

C. Exhibit 9 shall be omitted and the following designation shall be inserted following the printing of Exhibit 8:

"Exhibit 9 is identical with Exhibit 8 except that it relates to Len A. Maple."

D. Exhibits 6, 7 and 10 shall be omitted.

5. With reference to the transcript of testimony and proceedings on April 19 and April 23, 1946, referred to as Item 10 of appellee's Designation of

Contents of Record on Appeal in the United States District Court for the District of Oregon the following portions of said transcript shall be omitted and, in lieu thereof, the following statement shall be inserted:

Transcript pages 60 to 80, inclusive and pages 89 to 101, line 21, inclusive, consisting of the testimony of plaintiffs Popma, Craig, Williams, Maple, Hanson, Nordeide and Sundberg shall be omitted and in lieu thereof the following statement shall be inserted:

> "Thereupon plaintiffs Popma, Craig, Williams, Maple, Hanson, Nordeide and Sundberg gave testimony substantially in accord with the testimony given by plaintiffs Culver and Carr."

6. Exhibits 1 and 2 attached to the motion for entry of stipulated judgment, etc., designated as Item 16 in appellants' Designation of Contents of Record on Appeal in the United States District Court for the District of Oregon and as item 12 of the original certified record shall not be printed.

It is further stipulated that the portions of the record to be omitted in printing, as aforesaid, shall be and remain as parts of the record of said case and may be referred to by the Court or by either party in briefs or in arguments.

Dated this 3rd day of November, 1950.

/s/ THOMAS H. TONGUE, III,
Of Attorneys for Appellants.

/s/ RICHARD DEVERS,
Of Attorneys for Appellee.

In the United States Court of Appeals
for the Ninth Circuit

No. 12712

L. I. MACKLIN, et al.,

Appellants,

vs.

KAISER COMPANY, INC.,

Appellee.

STATEMENT OF POINTS ON WHICH APPELLANTS INTEND TO RELY ON APPEAL

The points upon which appellants intend to rely on the appeal of the above-entitled cause are as follows:

1. The District Court erred in failing and refusing to enter judgment based upon the stipulations of the parties for entry of judgment and the express consent of defendant and of the United States of America for the entry of such judgment.

2. The District Court erred in denying plaintiffs' motions for entry of judgment or, in the alternative, for the entry of summary judgment, or, in the alternative, for leave to file supplemental complaint.

3. The District Court erred in dismissing the action for want of prosecution.

Dated this 8th day of November, 1950.

/s/ THOMAS H. TONGUE, III,
Of Attorneys for Appellants.

Service accepted.

/s/ RICHARD DEVERS,
Of Attorneys for Respondent

[Endorsed]: Filed Nov. 9, 1950.